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COMMENTARIES

ON THE

Laws of England.

BOOK THE FOURTH.

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BY

SIR WILLIAM BLACKSTONE, KNT.
ONE OF THE JUSTICES OF HIS MAJESTY'S
COURT OF COMMON PLEAS.

(VOL. IV)

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AND WITH NOTES
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OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER THE FIRST.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

WE are now arrived at the fourth and last branch of these Commentaries; which treats of *public wrongs*, or *crimes* and *misdemesnors*. For we may remember that, in the beginning of the preceding volume [a], wrongs were divided into two species: the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemesnors; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly, their several degrees of guilt, as principals, or accessaries; fourthly, the several species of crimes, with the pu- [2]

nishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemesnor.

First, as to the general nature of crimes and their punishment; the discussion and admeasurement of which forms, in every country, the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown*; so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence [b].

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it it's adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a very great master of the crown law [c] has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices, and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law ought also to be the care and attention of the legislature in properly
[3] forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of

[b] See Vol. I. p. 268.

[c] Sir Michael Foster, pref. to rep.

these external boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations which successive conquerors or factions have established in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence: from some, or from all, of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations: the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own [d]. But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by those of his equals, against whom he can form no exception nor even a personal dislike; — even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the antient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete [4] or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy

[d] Baron Montesquieu, marquis Beccaria, &c.

the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon [e]. And surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or to cut down a cherry-tree in an orchard [f]. Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony, without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians [g]. (1)

It is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public:
[5] but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them with decency to those, whose abilities and stations enable

[e] See Vol. II. p. 345.
[f] Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.
[g] Stat. 5 Eliz. c. 20.

(1) The 9 G. 1. c. 22. which was made perpetual by the 31 G. 2. c. 42., has been in great measure repealed as to its capital punishments; the two offences mentioned in the text are now punishable, the first by seven years' transportation, or imprisonment with or without hard labour for any term not exceeding three years, and the second by transportation for life, or any term not less than seven years, or imprisonment with or without hard labour for any term not exceeding seven years. The 5 Eliz. c. 20. has been repealed by the 23 G. 3. c. 51., as well as so much of a statute of 1 & 2 P. & M. c. 4. as made it a capital felony for persons calling themselves Egyptians, to remain one month in England, by 1 G. 4. c. 116. By this last named statute, the 1 G. 4. c. 115., and several later enactments, the parts of several statutes which inflicted capital punishment for disproportionately small offences, were repealed; and smaller penalties, where necessary, were imposed. These will be specified in their proper places.

them to apply the remedy. Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to savour of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

I. A CRIME, or misdemesnor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemesnors; which, properly speaking, are mere synonymous terms; though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemesnors" only. (2)

THE distinction of public wrongs from private, of crimes and misdemesnors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs, or crimes and misdemesnors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime: for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity.

(2) In the English law offences are technically divided into felonies and misdemesnors, — under the latter term are comprised all offences which are not felonies, whether against common or statute law, whether indictable or subject only to summary punishment. The French law has three terms, distinguishing between "crimes," "delits," and "contraventions;" the first are those offences, of which the punishment renders the party infamous, and rather aims to inflict suffering on him than to produce his amendment; the second, those of which the punishment aims to reform the offender; the third, correspond in great measure to the class of offences punishable summarily by the English law, offences against the police, and good order of the community. Code Penal Disp. Prel. Art. 1

In all cases the crime includes an injury; every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury; but, as this species of treason in it's consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong: which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offence to the whole kingdom and all
[7] his majesty's subjects; but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make

ample satisfaction, as well for the private injury as for the public wrong. (3)

Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view, *viz.* not only to redress the party injured, by either restoring to him his right, if possible, or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of these Commentaries; but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. The nature of *crimes and misdemesnors* in general being thus ascertained and distinguished, I proceed, in the next place, to consider the general nature of *punishments:* which are evils or inconveniences consequent upon crimes and misdemesnors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for

(3) It is not very easy in theory, and quite impossible according to the English law, to lay down any single principle by which to distinguish crimes from civil injuries, — public from private wrongs. In theory, every wilful violation of another's right, however committed, and to whatever extent, is a crime, and so a public wrong. By the English law a distinction exists, but it seems wholly technical; depending sometimes on the situation of the agent; sometimes on the nature or relations of the thing which is the object of the act; sometimes on the manner in which the act is done; sometimes on the consequences of the act, the time of doing it, and other grounds which it would be useless here to enumerate, because they can only be learned thoroughly by an acquaintance with the law itself. This however will explain, why much of the reasoning in the text is necessarily unsatisfactory; because it is an attempt to explain upon one principle, what has been founded upon many.

crimes and misdemesnors [h]. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; since all are by
[8] nature equal. Whereof the first murderer Cain was so sensible, that we find him [i] expressing his apprehensions, that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any,) of punishing not only their own subjects, but also foreign embassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt [k].

As to offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se*; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with the right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness therefore of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into which they entered, when first they engaged in

[h] See Grotius, *de j. b. & p. l. 2. c. 20.* Puffendorf. de. j. n. & g. l. 8. c. 3.

[i] Gen. iv. 14.

[k] See Vol. I. p. 254.

society; it was calculated for, and has long contributed to, their own security.

THIS right therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all it's members, as each individual member had naturally over himself or others. Which has occasioned [9] some to doubt, how far a human legislature ought to inflict capital punishments for *positive* offences; offences against the municipal law only, and not against the law of nature: since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as in the case of murder, by the precept delivered to Noah, their common ancestor and representative, "whoso sheddeth man's blood, by man shall his blood be "shed [l]." In other instances they are inflicted after the *example* of the Creator, in his positive code of laws for the regulation of the Jewish republic: as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature; as for forgery, for theft, and sometimes for offences of a lighter kind. Of these we are principally to speak; as these crimes are, none of them, offences against natural, but only against social rights; not even theft itself, unless it be accompanied with violence to one's house or person: all others being an infringement of that right of property, which, as we have formerly seen [m], owes it's origin not to the law of nature, but merely to civil society.

THE practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, sir Matthew Hale [n]: "When offences grow enormous, "frequent, and dangerous to a kingdom or state, destructive "or highly pernicious to civil societies, and to the great in- "security and danger of the kingdom or it's inhabitants, "severe punishments, and even death itself, is necessary to "be annexed to laws in many cases by the prudence of law-

[l] Gen. ix. 6. [m] Book II. c. 1. [n] 1 Hal. P. C. 15.

"givers." It is therefore the enormity, or dangerous tendency, of the crime that alone can warrant any earthly
[10] legislature in putting him to death that commits it. It is not it's frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late empress Elizabeth, than under her more sanguinary predecessors? Is it now, under Catherine II. less civilized, less social, less secure? And yet we are assured, that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death: and the latter has, upon full persuasion of it's being useless, nay, even pernicious, given orders for abolishing it entirely throughout her extensive dominions [c]. But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded waggons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provision of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never
[11] justify such a law to the dictates of conscience and humanity.

[c] Grand instructions for framing a new code of laws for the Russian empire, § 210.

To shed the blood of our fellow-creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I WOULD not be understood to *deny* the right of the legislature in any country to enforce it's own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it; and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations that are given by the sovereign power.

2. As to the *end* or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being: but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut* "*poena* (as Tully [p] expresses it) *ad paucos, metus ad omnes,* "*perveniat;*" which gives rise to all ignominious punishments, and to such executions of justice as are open and public: or, lastly, by depriving the party injuring of the [12] power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing

[p] *Pro Cluentio*, 46.

future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any farther harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears incorrigible (4): which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment: and in such cases it would be cruelty to the public to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.

3. As to the *measure* of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

HENCE it will be evident, that what some have so highly extolled for it's equity, the *lex talionis*, or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent; to which we may add
[13] that law of the Jews and Egyptians, mentioned by Josephus

(4) The argument here assumes that the punishment of death is never inflicted, except for the purpose of disabling the offender from future mischief; whereas in fact it sometimes is, and I conceive may be wisely, inflicted for the purpose of deterring others by the terror of example.

and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. (5) On the other hand, retaliation may, sometimes, be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered by decreeing, in imitation of Solon's laws [q], that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour, and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict, and tends most to the security [14] of mankind; by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of

[q] Pott. Ant. b. 1. c. 26

(5) See Aristotle's Ethics, b. v. ch. 5., where the same argument is pursued.

retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers [r], that the punishment due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. ch. 18. that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in it's stead [s].

But though from what has been said it appears, that there cannot be any regular or determinate method of rating the
[15] quantity of punishments for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

As, first, with regard to the *object* of it: for the greater and more exalted the object of an injury is, the more care

[r] Beccar. c. 15. [s] Stat. 38 Edw. III. c. 9.

should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the *king*'s death is by the English law punished with greater rigour than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking: so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract: and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill (6), is far less penal that the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity; not because the intention is equivalent to the act itself, but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

AGAIN: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion that when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment, is less penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwise) of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime [a]. [16]

[a] Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received. "I was abused," says he, "by "my enemy, in cold blood, out of "malice, not by heat of wine, in the "morning, publicly, before strangers "as well as citizens; and that in the "temple, whither the duty of my "office called me."

(6) See post. p. 196. n.

FARTHER: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness [u]; and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit; according to what Cicero observes [v], "*ea sunt animadvertenda peccata maxime, quae difficillime* "*praecaventur.*" Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; in another it is only murder: to steal a handkerchief, or other trifle of above the value of twelve pence, privately from one's person, is made capital (7); but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And, in the island of Man, this rule was formerly carried so far, that to take away an horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or a fowl, which is easily done, was a capital misdemesnor, and the offender was punished with death [w].

LASTLY: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due dis-
[17] tinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action [x], that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of laws (says Montesquieu [y]) hinders their

[u] Beccar. c.23.
[v] *pro Sexto Roscio*, 40.
[w] 4 Inst. 285.
[x] Beccar. c.20.
[y] Sp. L. b. 6. c.13.

(7) See post. p. 242. n.

execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus also the statute 1 Mar. st. 1. c. 1. recites in it's preamble, "that the state of every king consists more assuredly in the "love of the subject towards their prince, than in the dread "of laws made with rigorous pains; and that laws made "for the preservation of the commonwealth without great "penalties are more often obeyed and kept, than laws made "with extreme punishments." (7) Happy had it been for the nation, if the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may farther observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of it's weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.

It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the

(7) The text only abridges, and that not very successfully, this preamble, which for the soundness of its reasoning, and appropriate solemnity of language, deserves to be cited entire. "Forasmuch as the state of every king, ruler, and governor of any realm, dominion, or commonalty, standeth and consisteth more assured by the love and favour of the subject toward their sovereign ruler and governor, than in the dread and fear of laws made with rigorous pains and extreme punishment for not obeying of their sovereign ruler and governor: and laws also justly made for the preservation of the commonweal, without extreme punishment or great penalty, are more often for the most part obeyed and kept, than laws and statutes made with great and extreme punishments, and in special such laws and statutes so made, whereby not only the ignorant and rude unlearned people, but also learned and expert people, minding honesty, are often, and many times, trapped and snared."

same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed
[18] both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed [z], that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same [a]: hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder (8). In China, murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China; in preventing frequent assassination and slaughter.

Beccar. c. 26. Sp. L. b. 6. c. 16.

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(8) The offence of wrongfully taking the goods of another is now punished with death in France, only under very particular circumstances. It must have been committed at night, by two or more persons in company, one of them at least armed; actual violence, or a threat of using arms, must have been used; the outer door of some dwelling house or its dependencies must have been broken, or opened by false keys, or the same must have been entered by scaling or burrowing; and further, the persons committing the crime must have assumed the title or uniform of some officer, civil or military, or must have pretended to act under the order of the civil or military authority.

When some, but not all, these aggravating circumstances concur, the offence is punished according to a graduated scale, by hard labour for life, term of years, or imprisonment of the kind which is called "reclusion," which subjects to hard labour, and involves greater civil disabilities than simple imprisonment.—Code Penal. liv. 3. t. 2. ch. 2. s. 1.

YET, though in this instance, we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament [b] to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, [19] through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices: and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn. (9)

[b] See Ruffhead's index to the statutes (tit. Felony), and the acts which have since been made.

(9) Without embarking in the question of capital punishment, which is far too difficult and complicated to be satisfactorily discussed in a note, it is right to observe, that the spirit of the legislature latterly has leaned very much to the humane and moderate reasoning of the author. Capital punishment has been rarely imposed, and in many instances been taken away since the commencement of the regency of his present majesty.

CHAPTER THE SECOND.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, considered in general the nature of crimes, and punishments, we are led next, in the order of our distribution, to enquire what persons are, or are not, *capable* of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts, which in other persons would be severely punished. In the process of which enquiry, we must have recourse to particular and special exceptions: for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

ALL the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has it's choice either to do or to avoid the fact in question, being the only thing that ren-
[21] ders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiae*, a fixed design or will to do an unlawful act, is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an *overt* act, or

some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now there are three cases, in which the will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he, therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which may be referred to the second; and compulsion or necessity, [22] which may properly rank in the third.

I. First, we will consider the case of *infancy*, or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever[a]. What the age of discretion is, in various nations is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth till seven

[a] 1 Hawk. P. C. 2.

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years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into equal parts: from seven to ten and an half was *aetas infantiae proxima*; from ten and an half to fourteen was *aetas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantiae proxima*, they were not punishable for any crime.[b] During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief: but with many mitigations, and not with the utmost rigour of the law.[c] During the last stage, (at the age of puberty, and afterwards,) minors were liable to be punished, as well capitally, as otherwise.

The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemesnors, so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences;[d] for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit,) for these an infant, above the age of
[23] fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open[e]; and from thence till the offender was fourteen, it was *aetas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve it was held that he could not be guilty in will, neither after

[b] *Inst.* 3. 20. 10.
[c] *Ff.* 29. 5. 14. 50. 17. 111. 47. 2. 23.
[d] 1 Hal. P. C. 20, 21, 22.
[e] *LL. Athelstan.* Wilk. 56.

fourteen could he be supposed innocent, of any capital crime, which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen: and in these cases our maxim is, that "*malitia* "*supplet aetatem.*" Under seven years of age indeed an infant cannot be guilty of felony [e]; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony [f]. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil [g]. And there was an instance in [24] the last century where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly [h]. Thus also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment [i]. But, in all such cases, the evidence of that malice

[e] Mir. c. 4. § 16. 1 Hal. P.C. 27.
[f] Dalt. Just. c. 147.
[g] 1 Hal. P. C. 26, 27.
[h] Emlyn on 1 Hal. P.C. 25.
[i] Foster. 72.

which is to supply age, ought to be strong and clear beyond all doubt and contradiction (1).

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that "*furiosus furore solo punitur*." In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself[k]. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced: and if, after judgment he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or exe-

[k] 3 Inst 6.

(1) The present French criminal law adopts but one distinction of age, as to the responsibility of the party. If an offence be committed under the age of sixteen, and it be found to have been committed "without discernment," the offender is to be acquitted; but according to circumstances he is to be returned to his relatives, or placed in a house of correction to be brought up there, and detained for any number of years not exceeding his twentieth. If it be found to have been committed "with discernment," the ordinary legal punishment for the crime is to be reduced on a graduated scale; the result of which is, that in no case can a person under sixteen suffer death, hard labour for life, or transportation; and where the punishment is one which is ordinarily attended by public exposure, (see post, p. 138. n.) that accompaniment is directed to be remitted. In the matter of punishment, though not of responsibility, the French code makes a distinction, founded on the age of the party, which, though in some respects practically adopted, is unknown in theory to our law. After the age of seventy, no one can be sentenced to transportation or hard labour; and when a person condemned to hard labour attains the age of seventy, he is relieved from it, and placed in a prison for the remainder of his term. Code Penal. liv. 2.

cution [l]. Indeed, in the bloody reign of Henry the eighth, a statute was made [m], which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by sir Edward Coke [n], "the exe-"cution of an offender is for example, *ut poena ad paucos,* "*metus ad omnes perveniat:* but so it is not when a madman "is executed; but should be a miserable spectacle, both against "law, and of extreme inhumanity and cruelty, and can be no "example to others." But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency [o]. Yet in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our antient law, that persons deprived of their reason might be confined till they recovered their senses [p], without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts [q], a method is chalked out for imprisoning, chaining, and sending them to their proper homes. (2)

[l] 1 Hal. P.C 34.
[m] 33 H. VIII. c. 20.
[n] 3 Inst. 6.
[o] 1 Hal. P.C. 31.
[p] Bro. *Abr. tit. Corone.* 101.
[q] 17 Geo. II. c. 5.

(2) The 39 & 40 G. 3. c. 94. has provided for the different cases in which a lunatic may appear before a jury, both where it is in evidence that he was insane at the time of committing the act charged upon him, and where he shall appear so at the time of arraignment or of trial. In the first case, the jury instead of a general verdict of acquittal, are directed to find his insanity specially, and whether they acquit him on that ground. In the latter cases, a jury shall be impanelled for the purpose of trying whether the prisoner be lunatic or otherwise at that time. If the verdict in either case establish the insanity, the prisoner must be kept in strict custody until the king's pleasure be known for the future disposal of him.

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III. THIRDLY; as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather than as an
[26] excuse for any criminal misbehaviour. A drunkard, says sir Edward Coke[r], who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit.* It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German, therefore, says the president Montesquieu[s], drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that he who committed a crime when "drunk, should receive a double punishment;" one for the crime itself, and the other for the ebriety which prompted him to commit it[t]. The Roman law indeed made great allowances for this vice: "*per vinum delapsis capitalis poena remittitur*[u]." But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real,) will not suffer any man thus to privilege one crime by another[w].

IV. A FOURTH deficiency of will, is where a man commits an unlawful act by *misfortune* or *chance*, and not by design.

[r] 1 Inst. 247.
[s] Sp. L. b. 14. c. 10.
[t] Puff. *de j. n. & g. l.* 8. *c.* 3. § 21.
[u] *Ff.* 49. 16. 6.
[w] Plowd. 19.

By the 56 G. 3. c. 117. provision is made for convicted criminals, who may become insane during their imprisonment: the secretary of state is empowered to remove them to some lunatic asylum, and direct their detention there until their recovery.

Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief happens to follow from the performance of a *lawful* act, the party [27] stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour [x]. (3)

V. FIFTHLY; *ignorance* or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action [y]: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law [z], as it was of the Roman [a].

VI. A SIXTH species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which

[x] 1 Hal. P. C. 39.
[y] Cro. Car. 538.
[z] Plowd. 343.
[a] *Ff.* 22. 6. 9.

(3) By "unlawful," is intended here any act morally wrong, that which is *malum in se*; for if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to use a gun for that purpose, the party will not be answerable for the unforeseen consequence. Foster, 259.

his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

[28] 1. Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted in *foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question, I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigotted days of queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coërcion of the parent or master [b]; though in some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coërcion of her husband; or even in his company, which the law construes a coërcion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will [c].

[b] 1 Hawk. P. C. 3. [c] 1 Hal. P. C. 45.

Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king Ina, the West Saxon [d]. And it appears that among the northern nations on [29] the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed: "*procul* "*dubio quod alterum libertas, alterum necessitas impelleret* [e]." But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife; no presumption of the husband's coërcion shall extenuate her guilt [f]: as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemesnors also we may remark another exception; that a wife may be indicted and set in the pillory *with* her husband, for keeping a brothel; for this is an offence touching the domestic oeconomy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex [g]. And in all cases, where the wife offends alone, without the company or coërcion of her husband, she is responsible for her offence, as much as any feme-sole. (4)

[d] *cap.* 57. Wilk. 24.
[e] Stiernh. *de jure Sueon. l.* 2. *c.* 4.
[f] 1 Hal. P. C. 47.
[g] 1 Hawk. P. C. 2, 3.

(4) Wherever coverture excuses a wife from punishment, it is upon the principle laid down in the text, of a coercion of the moral will; but that principle is not allowed to prevail in the highest, or the lowest offences. In the highest, as treason and murder, it is over-ruled, not so much, I conceive,

2. ANOTHER species of compulsion or necessity is what our law calls *duress per minas*[h]; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemesnors; at least before the human tribunal. But then that fear which compels a man to do an unwarrantable action, ought to be just and well-grounded; such "*qui in virum* "*constantem cadere posset, et non in hominem meticulosum*," as Bracton expresses it[i], in the words of the civil law[k]. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace[l]. (5) This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein

[h] See Vol. I. p. 131.
[i] *l.* 3. *tr.* 1. *c.* 4. § 3.
[k] *Ff.* 4. 2. 5 & 6.
[l] 1 Hal. P. C. 50.

ceive, for the reason assigned by the author, and drawn from the distinction between offences against the law of nature, and those against the law of society, as "for the odiousness and dangerous consequences of them." Why it is not allowed to prevail in misdemesnors is not so clear. Mr. Christian, in a note upon this passage, explains it by reference to the law of clergy; he says, that where husband and wife were tried for a felony within clergy, the husband would have escaped, and the wife suffered, as she never could have the benefit of clergy, — and that she was acquitted to prevent that hardship; but as there was no clergy in misdemesnors, and therefore the husband did not escape, the reason of the rule, and the rule ceased. It is inconsistent with this reasoning, that in the clergyable felony of manslaughter, the husband escaped, and yet coverture did not privilege the wife; so that the hardship was allowed to exist at least in one instance. 1 Hale, H. P. C. 46. — Perhaps as forfeiture was a necessary consequence on attainder for felony, and married women could have nothing to forfeit; whereas there was no forfeiture in misdemesnor; the reason for the exception may be found in this distinction. I am, however, more inclined to think that no one reason will be found capable of explaining both the rule and all the exceptions; but that policy, the humanity of the judges, the nature of the respective punishments, and other causes concurred with technical reasons to produce them.

(5) The only force that doth excuse is a force *upon the person*, and present fear of death, and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could. Foster, 14.

human magistrates are only the executioners of divine punishment. And therefore, though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent [m]. But in such a case he is permitted to kill the assailant; for there the law of nature, and self-defence, it's primary canon, have made him his own protector.

3. There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to [31] exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil, than in choosing the less. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony, which the killing would otherwise amount to [n].

4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; *viz.* whether a man in extreme want of food or cloathing may justify stealing either, to relieve his present necessities? And this both Grotius [o] and Puffendorf [p], together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods by a kind of tacit con-

[m] 1 Hal. P. C. 51.
[n] Ibid. 53.
[o] *de jure b. & p. l. 2. c. 2.*
[p] *de jure n. & g. l. 2. c. 6.*

cession of society is revived. And some even of our own lawyers have held the same [q], though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present [r]. And this it's doctrine is agreeable not only to the sentiments of many of the wisest antients, particularly Cicero [s], who holds that "*suum cuique* "*incommodum ferendum est, potius quam de alterius commodis* "*detrahendum*;" but also to the Jewish law, as certified by king Solomon himself [t]: "if a thief steal to satisfy his soul
[32] "when he is hungry, he shall restore sevenfold, he shall give "all the substance of his house:" which was the ordinary punishment for theft in that kingdom. (6) And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. The case of a stranger is, by the way, the strongest instance put by baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very

[q] Britton. c. 10. Mirr. c. 4. § 16.
[r] 1 Hal. P. C. 54.
[s] *de off. l.* 3. *c.* 6.
[t] Prov. vi 30.

(6) It is rather singular that the author referring to Puffendorf but a few lines before, does not notice his observation upon this passage, that it does not suppose those circumstances of extreme indigence or necessity, upon which alone he is arguing. He had also before that, remarked that the case of the Jews formed an exception to his general principle, because among them the law compelled the giving of alms; and therefore on that account also the extremity could not occur, which he contends to be a justification of theft. It may be added too, that the force of the passage is a little altered by its not being cited entire. "*Men do not despise a thief*, if he steal to satisfy his soul when he is hungry; but if he be found," &c.

constitution. Therefore our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous; especially when we consider, that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical; and these have in it's stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate it's rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king; who, by virtue of his royal prerogative, is not under the coërcive power of the law [t]; which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance. But of this sufficient was said in a former volume [u], to which I must refer the reader. [33]

[t] 1 Hal. P.C. 44.

[u] Book 1. ch. 7. pag. 244.

CHAPTER THE THIRD.

OF PRINCIPALS AND ACCESSORIES.

IT having been shewn in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; *viz.* as *principal*, and as *accessory*.

I. A MAN may be *principal* in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he is who is present, aiding, and abetting the fact to be done[a]. Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance[b]. And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it[c] who is ignorant of it's poisonous quality[d], or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed[e]. And the same reasoning will hold, with regard to other murders committed in the absence
[35] of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed: letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that

[a] 1 Hal. P.C. 615.
[b] Foster. 350.
[c] Kel. 52.
[d] Foster. 349.
[e] 3 Inst. 138.

death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily pre-supposing a principal: and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist [f].

II. An *accessory* is he who is not the chief actor in the offence, nor present at it's performance, but is someway concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will, first, examine, what offences admit of accessories, and what not: secondly, who may be an accessory *before* the fact: thirdly, who may be an accessory *after* it: and lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. And, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime [g]. Besides it is to be considered, that the bare intent to commit treason is many times actual treason: as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason. But [36] this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor [h]. In petit treason, murder

[f] 1 Hal. P. C. 617. 2 Haw. P. C. c. 29. § 11.
[g] 3 Inst. 138. 1 Hal. P. C. 613.
[h] Foster. 342.

and felonies with or without benefit of clergy, there may be accessories: except only in those offences, which by judgment of law are sudden and unpremeditated, as man-slaughter and the like; which therefore cannot have any accessories *before* the fact[l]. So too in petit larceny, and in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals[k]: the same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals, *propter odium delicti;* in trespass all are principals, because the law, *quae de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemesnors. It is a maxim, that *accessorius sequitur naturam sui principalis*[l]: and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder[m].

2. As to the second point, who may be an accessory *before* the fact; sir Matthew Hale[n] defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory: for if such procurer, or the like, be present, he is guilty of the crime as principal. If A then advises B to kill another, and
[37] B does it in the absence of A, now B is principal, and A is accessory in the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given. As if A, the reputed father, advises B, the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder[o]. And it is also settled[p], that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an ac-

[k] 1 Hal. P.C. 615.
[l] *Ibid.* 613. 616.
[l] 3 Inst. 139.
[m] 2 Hawk. P.C. c. 29. § 15.
[n] 1 Hal. P.C. 616.
[o] Dyer. 186.
[p] Foster. 125.

cessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him so that he dies; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house; and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature[q]. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies: the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of it's execution is a mere collateral circumstance[r].

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon[s]. Therefore to make an accessory *ex post facto*, it is, in the first place, requisite that he knows of the felony committed[t]. In the next place, he must receive, relieve, comfort, or assist him. And generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other [38] shelter to conceal him, or open force and violence to rescue or protect him[u]. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with cloaths or other necessaries, is no offence; for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law[v]. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere

[q] 1 Hal. P.C. 617.
2 Hawk. P.C. c. 29. § 20.
1 Hal P.C. 618.
[r] 2 Hawk. P.C. c. 29. § 32.
[s] 2 Hawk. P.C. c. 29. § 26.
[t] 1 Hal. P.C. 620, 621.

misdemesnor, and made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon* [u]: but now by the statutes 5 Ann. c. 31. and 4 Geo. I. c. 11. all such receivers are made accessories (where the principal felony admits of accessories [w]), and may be transported for fourteen years (1); and, in the case of receiving linen goods stolen from the bleaching-grounds, are by statute 18 Geo. II. c. 27. declared felons without benefit of clergy. (2) In France such receivers are punished with death (3): and the Gothic constitutions distinguished also three sorts of thieves, "*unum* "*qui consilium daret, alterum qui contrectaret, tertium qui* "*receptaret et occuleret; pari poenae singulos obnoxios* [x]."

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed [y]. But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or

[u] 1 Hal. P.C. 620.
[w] Foster. 73.
[x] Stiernhook *de jure Goth. l.* 3. *c.* 5.
[y] 2 Hawk. P.C. c. 29. § 35.

(1) See post, 132.

(2) The part of this statute, which inflicts capital punishment, whether on principals or accessories, was repealed by the 51 G. 3. c. 41., and transportation or imprisonment substituted. But even by the statute itself (s. 2.), the judge had a power given him of commuting the punishment for transportation.

(3) The general rule in the present French law is, that accessories before the fact are punished exactly as their principals, and also such accessories after, as knowing the criminal pursuits of their principals, are *in the habit* of supplying them with places of assembly, or retreat. Receivers of stolen goods are classed among such accessories with this qualification, that as the offence of wrongful taking is punished with death, hard labour for life, and transportation, only when committed under certain circumstances, the receiver of goods taken under these circumstances must be proved to have known of them at the time of the receiving, in order to be subjected to those respective punishments If this proof fails, the punishment is hard labour for a term of years. Code Penal. L. 2.

even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *ex post facto* [a]. But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coërcion, and therefore she is not bound, neither ought she, to discover her lord [b]. [39]

4. THE last point of inquiry is, how accessories are to be treated, considered distinct from principals. And the general rule of the antient law (borrowed from the Gothic constitutions [b]) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable [c]: as, by the laws of Athens, delinquents and their abettors were to receive the same punishment [d]. Why then it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them: accessories *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing [e] and stealing of linen from bleaching-grounds [f]: which is denied to the principals and accessories *before* the fact, in many cases; as, among others, in petit treason, murder, robbery, and wilful burning [g]. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater

[a] 3 Inst 108. 2 Hawk. P.C. c. 29. § 34.
[b] 1 Hal. P.C. 621.
[b] See Stiernhook, *ibid.*
[c] 3 Inst. 138.
[d] Pott. Antiq. b. 1. c. 26.
[e] Stat. 31 Eliz. c. 12.
[f] Stat. 18 Geo II. c. 27. (4)
[g] 1 Hal. P.C. 615.

(4) See ante p. 38. n. 2.

than that of his accomplices, by reason of the difference of his punishment[h]. (5) 3. Because formerly no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him: though that law is now much altered, as will be shewn more fully in it's proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal: for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself: but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also[i]. (6) But it is clearly held, that one acquitted as principal may be indicted as an accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessories as offend *before* the fact is committed.

[h] Beccar. c. 37.

[i] 1 Hal. P.C. 625. 626. 2 Hawk. P.C. c.35. § 11. Foster. 361.

(5) It is impossible, however, not to feel, that in many instances the conduct of the accessory before the fact is much more criminal and mischievous than that of the principal, and therefore merits a severer punishment. The legislature has recently acted under this impression, and by 5 G. 4. c. 38. has enacted that in all cases in which accessories before the fact to any grand larceny, are by the law within benefit of clergy, and liable only to a fine and one year's imprisonment, the court may at its discretion, instead of that punishment, sentence them to transportation for seven years, or imprisonment with or without hard labour to the extent of three years. And for the more speedy conviction of such offenders, the same statute enacts that all accessories before the fact to burglary, robbery, or grand larceny, may be prosecuted for a misdemesnor, and punished with two years' imprisonment and hard labour, though their principals have not been convicted, and whether they are or are not amenable to justice.

(6) The authorities of Hawkins and Foster are both against this reasoning, and the principle of the law is certainly with them, because the offences are specifically different, and require different evidence to prove them.

CHAPTER THE FOURTH.

OF OFFENCES AGAINST GOD AND RELIGION.

IN the present chapter we are to enter upon the detail of the several species of crimes and misdemesnors, with the punishments annexed to each by the laws of England. It was observed in the beginning of this book [a], that crimes and misdemesnors are a breach and violation of the public rights and duties owing to the whole community, considered as a community, in it's social aggregate capacity. And in the very entrance of these Commentaries [b] it was shewn that human laws can have no concern with any but social and relative duties, being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society [c]: and of consequence private vices or breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law, any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowledge, and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any shape [42] is derogatory from sound morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as

[a] See pag. 5.
[b] See Vol. I pag. 123, 124.
[c] Beccar. ch 8.

slander and malicious prosecution, for which a private recompence is given. And yet drunkenness and malevolent lying are *in foro conscientiae* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

On the other hand, there are some misdemesnors, which are punished by the municipal law, that have in themselves nothing criminal, but are made unlawful by the positive constitutions of the state for public convenience; such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality consists in their disobedience to the supreme power, which has an undoubted right, for the well-being and peace of the community, to make some things unlawful, which were in themselves indifferent. Upon the whole, therefore, though part of the offences to be enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

Having premised this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion: secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly infringe the rights of the public or commonwealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

[43]

First then, of such crimes and misdemesnors, as more immediately offend Almighty God, by openly transgressing the

precepts of religion either natural or revealed; and mediately, by their bad example and consequence, the law of society also: which constitutes that guilt in the action, which human tribunals are to censure.

I. Of this species the first is that of *apostasy*, or a total renunciation of christianity, by embracing either a false religion, or no religion at all. This offence can only take place in such as have once professed the true religion. The perversion of a christian to judaism, paganism, or other false religion, was punished by the emperors Constantius and Julian with confiscation of goods [d]; to which the emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity [e]: a punishment too severe for any temporal laws to inflict upon any spiritual offence; and yet the zeal of our ancestors imported it into this country; for we find by Bracton [f], that in his time apostates were to be burnt to death. Doubtless the preservation of christianity, as a national religion, is, abstracted from it's own instrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Saviour Christ,) these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting: all moral evidence, therefore, all confidence in human veracity, must be weak- [44]
ened by apostasy, and overthrown by total infidelity [g]. Wherefore all affronts to christianity, or endeavours to depreciate it's efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier

[d] Cod. 1. 7. 1.

[e] *Ibid.* 6.

[f] *l.* 3. c. 9.

[g] *Utiles esse opiniones has, quis neget, cum intelligat, quam multa firmentur jurejurando; quantae salutis sint foedera religiones; quam multos divini supplicii metus a scelere revocarit; quamque sancta sit societas civium inter ipsos, Dis immortalibus interpositis tum judicibus, tum testibus?* Cic. de *L.L.* ii 7.

penalty than the offence, taken in a civil light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostasy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animae*. But about the close of the last century, the civil liberties to which we were then restored being used as a cloke of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those miscreants[h] to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 W. III. c. 32. that if any person educated in, or having made profession of, the christian religion, shall, by writing, printing, teaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. To give room however for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities. (1)

II. A second offence is that of *heresy*, which consists not in a total denial of christianity, but of some of it's essential
[45] doctrines, publicly and obstinately avowed; being defined by sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa*[i]." And here it must also be acknowledged that particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coërcion by the civil magistrate. What doctrine shall therefore be adjudged heresy, was left by our old constitution to

[h] *Mescroyantz* in our antient law books is the name of unbelievers.

[i] 1 Hal. P.C. 384.

(1) See post, p. 50.

the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode [k], extends to the smallest deviation from the doctrines of holy church: "*haereticus est qui dubitat de fide catholica, et qui negligit servare ea, quae Romana ecclesia statuit, seu servare decreverat.*" Or, as the statute 2 Hen. IV. c. 15. expresses it in English, "teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigotted princes, to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions: with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderatur* [l]: well knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments [46] inflicted on the antient Donatists and Manichæans by the emperors Theodosius and Justinian [m]: hence also the constitution of the emperor Frederic mentioned by Lyndewode [n], adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution [o], ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it

[k] *cap. de haereticis.*
[l] *Decretal. l. 5. t. 40. c. 27.*
[m] *Cod. l. 1. tit. 5.*
[n] *c. de haereticis.*
[o] *Cod. l. 5. 4.*

should be lawful for good catholics to seise and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou [p].

Christianity being thus deformed by the daemon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our ancient precedents [q] a writ *de haeretico comburendo*, which is thought by some to be as antient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de haeretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council [r]. (2)

[47] But in the reign of Henry the fourth, when the eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy [s]) took root in this kingdom; the clergy taking advantage from the king's dubious title to demand an increase of

[p] Baldus *in Cod.* 1. 5. 4.
[q] F. N. B. 269.
[r] 1 Hal. P. C. 395.
[s] So called not from *lolium*, or tares, (an etymology, which was afterwards devised in order to justify the *burning* of them, Matth. xiii. 30.) but from one Walter Lolhard, a German reformer, A. D. 1315. Mod. Un. Hist. xxvi. 13. Spelm. *Gloss.* 371.

(2) Neither could the writ issue for the first offence; the party must once have abjured, and then relapsed into the same or some other heresy. 5 Rep. xxiii. F. N. B. 269.

their own power, obtained an act of parliament[t], which sharpened the edge of persecution to it's utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V. c. 7. lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

AFTERWARDS, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for though what heresy *is*, was not then precisely defined, yet we were told in some points what it is *not*: the statute 25 Hen. VIII. c. 14. declaring that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. VIII. c. 14. the bloody law of the six articles was made, which established the six most contested points of popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by the most "godly study, pain, and travail of his majesty: for which his [48] "most humble and obedient subjects, the lords *spiritual* and "temporal, and the commons, in parliament assembled, did "not only render and give unto his highness their most high "and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the

[t] 2 Hen. IV. c. 15.

supremacy of the bishops of Rome, and establishing all other their corruptions of the christian religion.

I shall not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of queen Elizabeth; when the reformation was finally established with temper and decency, unsullied with party rancour, or personal caprice and resentment. By statute 1 Eliz. c. 1. all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; *viz.* as to the infliction of common censures, in the ecclesiastical courts; and in case of burning the heretic, in the provincial synod only[t]. Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also, though he agrees, that in either case the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwise merely at the king's discretion[u]. But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets, which have been heretofore so declared, 1. By the words of the canonical scriptures: 2. By the first four general councils, or such others as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man continued still
[49] liable to be burnt, for what perhaps he did not understand to be heresy till the ecclesiastical judge so interpreted the words of the canonical scriptures.

For the writ *de haeretico comburendo* remained still in force; and we have instances of it's being put in execution upon two Anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the first. But it was totally abolished, and heresy again subjected only to ecclesiastical correction *pro salute animae*, by virtue of the statute 29 Car. II. c. 9. For in one and the same reign, our lands were delivered from the

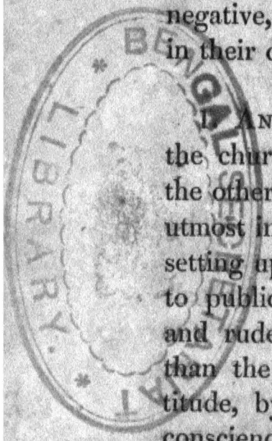
[t] 5 Rep. xxiii. 12 Rep. 56. 92. [u] 1 Hal. P. C. 405.

slavery of military tenures, our bodies from arbitrary imprisonment by the *habeas corpus* act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

In what I have now said, I would not be understood to derogate from the just rights of the national church, or to favour a loose latitude of propagating any crude undigested sentiments, in religious matters. Of propagating I say; for the bare entertaining them, without an endeavour to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be, with respect to the spiritual cognizance, and spiritual punishment, of heresy: unless perhaps that the crime ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics; yet not to harass them with temporal penalties, much less to exterminate or destroy them. The legislature hath indeed thought it proper, that the civil magistrate should again interpose, with regard to one species of heresy, very prevalent in modern times; for by statute 9&10 W. III. c. 32. if any person educated in the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or maintain that there are more Gods than one, he shall undergo the same penalties [50] and incapacities, which were just now mentioned to be inflicted on apostacy by the same statute. (3) And thus much for the crime of heresy.

(3) This statute, so far as regards the denying any one of the persons of the Holy Trinity to be God, is repealed by the 53 G. 3. c. 60. It should seem now, therefore, that the temporal courts have no jurisdiction directly in cases of heresy, but they may still have to determine collaterally what falls within that description; as in a *quare impedit*, if the bishop pleads that he refused the clerk for heresy, it is said that he must set forth the particular point; for the court having conusance of the original cause, must, by consequence, have a power as to all collateral and incidental matters

III. Another species of offences against religion are those which affect the *established church*. And these are either positive or negative: positive, by reviling it's ordinances; or negative, by non-conformity to it's worship. Of both of these in their order.



I. And, first, of the offence of *reviling the ordinances* of the church. This is a crime of a much grosser nature than the other of mere non-conformity: since it carries with it the utmost indecency, arrogance, and ingratitude; indecency, by setting up private judgment in virulent and factious opposition to public authority: arrogance, by treating with contempt and rudeness what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However, it is provided by statutes 1 Edw. VI. c. 1. and 1 Eliz. c. 1. that whoever reviles the sacrament of the Lord's supper shall be punished by fine and imprisonment; and by the statute 1 Eliz. c. 2. if any minister shall speak any thing in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice: for the second offence he shall be deprived, and suffer one year's imprisonment: and, for the third, shall in like manner be deprived, and suffer imprisonment for life. And if *any person* whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence an hundred marks; for the second, four hundred; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.
[51] These penalties were framed in the infancy of our present establishment, when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy and the terror of these laws (for they seldom, if ever,

which are necessary for its determination, though in themselves they belong to another jurisdiction. See Hawk. Pl. C. B. 1. c. 2.

were fully executed), proved a principal means, under Providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time (of the milder penalties at least) be thought too severe and intolerant; so far as they are levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and *obstructing* it's ordinances, for not submitting it's public judgment to the private opinion of others. For, though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship; yet contumely and contempt are what no establishment can tolerate[v]. A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and absurd; but the latter is at present the less excusable, because from political reasons, sufficiently hinted at in a former volume[w], it would now be extremely unadvisable to make any alterations in the service of the church; unless by it's own consent, or unless it can be shewn that some manifest impiety or shocking absurdity will follow from continuing the present forms.

2. NON-CONFORMITY to the worship of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a matter of private conscience, to the scruples of which our present laws have shewn a very just and christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church: there is always a difference to be made [52] between toleration and establishment.

NON-CONFORMISTS are of two sorts: first, such as absent themselves from divine worship in the established church, through total irreligion, and attend the service of no other

[v] By an ordinance 23 Aug. 1645, which continued till the restoration, to preach, write, or print any thing in derogation or depraving of the *directory* for the then established presbyterian worship, subjected the offender upon indictment to a discretionary fine, not exceeding 50 pounds. (Scobell. 98.)

[w] Vol. I. p. 98.

persuasion. These by the statutes of 1 Eliz. c. 2., 23 Eliz. c. 1., and 3 Jac. I. c. 4. forfeit one shilling to the poor every Lord's day they so absent themselves, and 20*l.* to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forfeit 10*l. per* month.

The second species of non-conformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and protestant dissenters: both of whom were supposed to be equally schismatics in not communicating with the national church; with this difference, that the papists divided from it upon material, though erroneous, reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or disturbance to the state. He is bound indeed to protect the established church: and, if this can be better effected, by admitting none but it's genuine members to offices of trust and emolument, he is certainly at liberty so to do: the disposal of offices being matter of favour and discretion. But, this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and
[53] colour of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

With regard therefore to *protestant dissenters*, although the experience of their turbulent disposition in former times oc-

casioned several disabilities and restrictions (which I shall not undertake to justify) to be laid upon them by abundance of statutes [x], yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing schism, and denied to the church of England [y]. The penalties are conditionally suspended by the statute 1 W. & M. st. 1. c. 18. "for exempting their majesties' protestant "subjects, dissenting from the church of England, from the "penalties of certain laws," commonly called the toleration act; which is confirmed by statute 10 Ann, c. 2., and declares that neither the laws above mentioned, nor the statutes 1 Eliz. c. 2. § 14., 3 Jac. I. c. 4. & 5., nor any other penal laws made against popish recusants (except the test acts), shall extend to any dissenters, other than papists and such as deny the Trinity: provided, 1. that they take the oaths of allegiance and supremacy (or make a similar affirmation, being quakers [z]), and subscribe the declaration against popery; 2. that they repair to some congregation certified to and registered in the court of the bishop or archdeacon, or at the county sessions; 3. that the doors of such meeting-house shall be unlocked, unbarred, and unbolted; in default of which the persons meeting there are still liable to all the penalties of the former acts. Dissenting teachers, in order to be exempted from the penalties of the statutes 13 & 14 Car. II. c. 4., 15 Car. II. c. 6., 17 Car. II. c. 2., and 22 Car. II. c. 1. are also to subscribe the articles of religion mentioned in the statute 13 Eliz. c. 12. (which only concern the confession of the true christian faith, and the doctrine of the sacraments,) with an express exception of those relating to the government and powers of the church, [54] and to infant baptism; or if they scruple subscribing the same, shall make and subscribe the declaration prescribed by statute 19 Geo. III. c. 44. professing themselves to be christians and protestants, and that they believe the scriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means universally abrogated, it is suspended and ceases to

[x] 23 Eliz. c. 1. 29 Eliz. c. 6. 35 Eliz. c. 1. 22 Car. II. c. 1.

[y] The ordinance of 1645 (before cited) inflicted imprisonment for a year on the third offence, and pecuniary penalties on the former two, in case of using the book of common prayer not only in a place of public worship, but also in any private family.

[z] See stat. 8. Geo. I. c. 6.

exist with regard to these protestant dissenters, during their compliance with the conditions imposed by these acts: and, under these conditions, all persons, who will approve themselves no papists or oppugners of the Trinity (4), are left at full liberty to act as their consciences shall direct them, in the matter of religious worship. And if any person shall wilfully, maliciously, or contemptuously disturb any congregation, assembled in any church or permitted meeting-house, or shall misuse any preacher or teacher there, he shall (by virtue of the same statute, 1 W. & M.) be bound over to the sessions of the peace, and forfeit twenty pounds. But by statute 5 Geo. I. c. 4. no mayor or principal magistrate must appear at any dissenting meeting with the ensigns of his office [a], on pain of disability to hold that or any other office: the legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility. Dissenters also, who subscribe the declaration of the act 19 Geo. III. are exempted (unless in the case of endowed schools, and colleges,) from the penalties of the statutes 13 & 14 Car. II. c. 4. and 17 Car. II. c. 2. which prohibit (upon pain of fine and imprisonment) all persons from teaching school, unless they be licensed by the ordinary, and subscribe a declaration of conformity to the liturgy of the church, and reverently frequent divine service, *established* by the laws of this kingdom. (5)

[a] Sir Humphry Edwin, a lord mayor of London, had the imprudence soon after the toleration act to go to a presbyterian meeting-house in his formalities; which is alluded to by Dean Swift, in his *tale of a tub*, under the allegory of *Jack* getting on a great horse, and eating custard.

(4) As to these last see ante, p. 50. n. 3.

(5) An important statute upon this subject was passed in the close of the last reign (the 52 G. 3. c. 155.) by which the 13 & 14 C. 2. c. 1. 17 C. 2. c. 2. and 22 C. 2. c. 1. are repealed; and it is enacted, that places of religious worship for protestants shall be certified to, and registered in the bishop's or archdeacon's court, and at the general or quarter sessions, that persons officiating in, or resorting to places of worship so certified, shall be exempt from all pains or penalties relieved against by the toleration act, as fully as if they had taken the oath, and made the declaration mentioned in that act. But every one preaching or teaching at such place, shall, when required by a magistrate, take and subscribe the oath and declaration specified in the 19 G. 3. c. 44.; and if not required so to do, he may call upon any

As to *papists*, what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of [55] opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay, even their transubstantiation. But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

Let us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are disabled from taking their lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they may not keep or teach any school under pain of perpetual imprisonment; and if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons, who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess it's errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be

any magistrate to administer such oath to him, and to attest his subscription to such declaration, and to give him a certificate thereof, which certificate will exempt him from certain civil offices and burthens, supposing he employs himself solely in the duties of a teacher or preacher, and does not follow any trade or other occupation but that of a schoolmaster. These places of religious assembly must not be locked, bolted, or barred; but they are protected by penalties from disturbance. The act does not extend to places in which the service is performed according to the rites and ceremonies of the established church, nor to the meetings of Quakers.

educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes to their maintenance when there; both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy, or perversion, where a person is reconciled to the see of
[56] Rome, or procures others to be reconciled, the offence amounts to high treason. 2. Popish recusants, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those before mentioned. They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100*l.*; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l.* No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two-thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10*l.* a month, or the third part of all his lands. And, lastly, as a feme-covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they shall be guilty of felony, and suffer death as felons without benefit of clergy. There is also an inferior species of recusancy, (refusing to make the declaration against popery, enjoined by statute 30 Car. II. st. 2. when tendered by the proper magistrate,) which, if the party resides within ten miles of London, makes him an absolute recusant convict; or if at a greater distance, suspends

him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being[b], of a lay papist. But, 3. The remaining species or degree, *viz.* popish priests, are in a still more dangerous condition. For by statute 11 & 12 W. III. c. 4. popish priests or bishops, celebrating mass, or exercising any part of their functions in England, except in the houses of ambassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2. any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, (unless driven by stress of weather, and tarrying only a reasonable time[c],) or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy. [57]

This is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes[d], that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, (what foreigners who only judge from our statute-book are not fully apprized of,) that these laws are seldom exerted to their utmost rigour: and, indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The powder-treason, in the succeeding reign,

[b] Stat. 23 Eliz. c. 1. 27 Eliz. c. 2. 11 & 12 W. III. c. 4. 12 Ann. st. 2. 29 Eliz. c. 6. 35 Eliz. c. 2. 1 Jac. I. c. 14. 1 Geo. I. st. 2. c. 55. 3 Geo. I. c. 4. 3 Jac. I. c. 4. & 5. 7 Jac. I. c. 6. c. 18. 11 Geo. II. c. 17. 3 Car. I. c. 2. 25 Car. II. c. 2. 30 Car. II. st. 2. 1 W. & M. c. 9. 15. & 26.

[c] Raym. 377. Latch. 1.

[d] Sp. L. b. 19. c. 27.

struck a panic into James I. which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I., the prospect of a popish successor in that of Charles II., the assassination-plot in the reign of king William, and the avowed claim of a popish pretender to the crown in that and subse-
[58] quent reigns, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England, but in every kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts; at least till the *civil* principles of the Roman catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot, to drag down the vengeance of these occasional laws upon inoffensive, though mistaken subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

This hath partly been done by statute 18 Geo. III. c. 60. with regard to such papists as duly take the oath therein prescribed, of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only the statute of 11 & 12 W. III. is repealed, so far as it disables them from purchasing or inheriting, or authorises the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth. (6)

(6) The benefits of the 18 G. 3. c. 60. have been most materially enlarged by the 31 G. 3. c. 32. explained in one particular by the 43 G. 3. c. 30. This statute prescribes, first, a declaration and oath, by which in substance, the party promises allegiance, and to support the protestant succession, abjuring allegiance to any other person; he swears that he rejects the dangerous doctrines that heretics or infidels may be murdered, or that faith is not to be kept with them, or that princes excommunicated may be deposed or murdered;

In order the better to secure the established church against perils from non-conformists of all denominations, infidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the *corporation* and *test* acts: by the former of which no person can be legally elected to any

Stat. 13 Car. II. st. 2. c. 1.

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murdered; he declares that he does not believe the pope, or any other foreign prince or potentate to have, or be entitled to, any temporal power in this realm; and, finally, that he swears and declares all this simply and literally without any mental reservation whatsoever. It repeals, secondly, in favour of all persons taking this oath, the statutes of recusancy, and as explained by 43 G. 3. c. 30. supersedes the necessity of taking the oath, or making the declaration in 18 G. 3. c. 60. It next permits the use of Roman catholic places of worship, and Roman catholic schools under certain regulations of registering, keeping the former open, &c. It enacts also that no Roman catholic shall be summoned to take the oath of supremacy, or to make the declaration against transubstantiation; it repeals in favour of those taking the prescribed oath, &c., the 1 W. & M. st. 1. c. 9. for removing papists from London and Westminster, and for preventing Roman catholic peers from coming into the presence of the king; and also the laws requiring the registry and enrollment of the deeds and wills of Roman catholics; and substitutes the oath prescribed for the oath of supremacy, and declaration against transubstantiation in the case of Roman catholic barristers, attorneys, &c. But this statute does not enable a Roman catholic to hold the mastership of any royal college or school, or any endowed college or school; nor can such person keep any school in Oxford or Cambridge, nor in any place receive into his school the child of a protestant father. Nor does the act allow any Roman catholic to found, endow, or establish any religious order, or society bound by monastic vows, or any school, academy or college; and all uses, trusts, and dispositions of property which were before deemed superstitious or unlawful, remain so still.

By an act of the Irish parliament (33 G. 3.), Roman catholics were enabled to hold certain offices in Ireland, upon taking an oath prescribed in the 13 & 14 G. 3. [Irish Act,] and an oath and declaration specified in that act; it was therefore declared and enacted by the 55 G. 3. c. 128. that persons who having so qualified themselves, held offices in Ireland, should not be liable to any penalties in England or elsewhere; and also that persons so qualified, and having taken commissions in Ireland in the king's army, might take higher commissions in England without exposing themselves to any pains or penalties. The 57 G. 3. c. 92. also enables the king to grant any commissions in the army, navy, or marines, without previously requiring the persons to take any oaths, or make any declaration, leaving the law however untouched as to oaths, or declarations required to be taken or made within a given time after acceptance.

Roman catholics are still unable to vote at elections; at least the oath of supremacy may be tendered to any one coming to vote: nor can they sit in either house of parliament, because the oath of supremacy, and the declaration against popery must still be made by every member.

office relating to the government of any city or corporation, unless, within a twelvemonth before he has received the sacrament of the Lord's supper according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office: or, in default of either of these requisites, such election shall be void. The other, called the test act[f], directs all officers, civil and military, to take the oaths and make the declaration against transubstantiation, in any of the
[59] king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission: and also within the same time to receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and churchwarden, and also to prove the same by two credible witnesses; upon forfeiture of 500*l.* and disability to hold the said office. (7) And of much the same nature with these is the statute 7 Jac. I. c. 2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favour of the Jews, was the next session of parliament restored again with some precipitation.

Thus much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animae;* while the temporal courts resent the public

[f] Stat. 25 Car. II. c. 2. explained by 9 Geo. II. c. 26.

(7) The 5 G. 1. c. 6. so far repeals the corporation act, as to make the election not *ipso facto* void, because the party has not taken the sacrament within the period prescribed; and to limit the time for removal, or prosecution, to six months after the election and actual possession of the office: but it is usual in every session of parliament to pass an act, which, under certain regulations and conditions, indemnifies those who may have neglected to comply with these acts.

affront to religion and morality on which all government must depend for support, and correct more for the sake of example than private amendment.

IV. The fourth species of offences therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment [g]: for christianity is part of the laws of England [h]. (8)

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and *cursing*. By the last statute against which, 19 Geo. 2. c. 21. which re- [60]

[g] 1 Hawk. P.C. c. 5. [h] 1 Ventr. 293. 2 Strange, 834.

(8) See ante, pp. 44 & 50. The title of the statute of W. 3. there mentioned, is, "An act for the more effectual suppression of blasphemy and profaneness:" but these were, and still are, offences at common law, and may be proceeded against as such at the option of the prosecutor; the principle being, that where a statute without negative words merely imposes a new punishment, or directs a new mode of prosecution for that which was previously an offence at common law, and does not change the nature of the offence from a felony to a misdemeanour, or *vice versâ*, the statute is merely cumulative, and the common law offence, prosecution and punishment remain as before. *R.* v. *Carlile*, 3 B. & A. 161.

Where the blasphemy is contained in any libel, and the offender has been once convicted of the offence, he may, by the 60 G. 3. and 1 G. 4. c 8., on a second conviction before any commission of oyer and terminer, or gaol delivery, or in K. B., be banished from all parts of his majesty's dominions, for such term of years as to the court shall seem proper. If he shall not depart from the United Kingdom within thirty days after sentence pronounced, for the purpose of going into banishment, he may be conveyed to such parts out of his majesty's dominions, as his majesty by the advice of his privy council may direct. And if at any time after forty days from sentence pronounced, and before the expiration of the term of banishment, he be found at large without lawful cause in any part of his majesty's dominions, he may be sentenced to transportation for fourteen years. By the same statute a power is given to the court in case of conviction for a blasphemous libel, to direct the seizure of all copies of the work in the possession of the defendant, or of any one as his trustee; if the judgment be arrested or reversed, the copies are to be restored free of expence; if not, they are to be disposed of as the court shall order.

peals all former ones, every labourer, sailor, or soldier profanely cursing or swearing shall forfeit 1*s.*; every other person under the degree of a gentleman 2*s.*; and every gentleman or person of superior rank 5*s.* to the poor of the parish; and, on the second conviction, double; and, for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. (9) Any justice of the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he forfeits 5*l.* and the constable 40*s.* And the act is to be read in all parish churches, and public chapels, the Sunday after every quarter-day, on pain of 5*l.* to be levied by warrant from any justice. Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I. c. 21. that if in any stage-play, interlude, or shew, the name of the Holy Trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10*l.*, one moiety to the king, and the other to the informer.

VI. A SIXTH species of offence against God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft*, *conjuration*, *inchantment*, or *sorcery*. To deny the possibility, nay, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament: and the thing itself is a truth to which every nation in the world hath in it's turn borne testimony, either by examples seemingly well attested, or by prohibitory laws; which at least suppose the possibility of commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but

(9) Where a common soldier or sailor upon conviction is unable to pay or find security for the penalty, instead of being committed to the house of correction, he is to be set in the stocks for one hour for every single offence, and for any number of offences whereof he may be convicted at the same time, two hours. All proceedings under the act must be commenced within eight days after the offence committed. By the 4 G. 4. c. 31. the section of the statute which enjoins it's being read in all parish churches four Sundays in the year, is repealed.

also those who consult them [l], imitating in the former the express law of God [k], "thou shalt not suffer a witch to live." And our own laws, both before and since the conquest, have been equally penal; ranking this crime in the same class with heresy, and condemning both to the flames [l]. The president [61] Montesquieu [m] ranks them also both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. (10) And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own [n], that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it.

Our forefathers were stronger believers, when they enacted by statute 33 Hen. VIII. c. 8. all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1 Jac. I. c. 12. that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or inchantment; or killing or otherwise hurting any person by such infernal arts, should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man

[l] *Cod. l.* 9. *c.* 18.
[k] Exod. xxii. 18.
[l] 3 Inst. 44.
[m] Sp. L. b. 12. c. 5.
[n] Mr. Addison, Spect. No. 117.

(10) There is nothing more common in the earlier periods of our history, than charges or imputations of this nature, against persons of the highest rank; and the anxiety manifested by the individuals to clear themselves, shows both the credit and importance attached to the stories. Every one is familiar with the cases of the duchess of Gloucester, in the reign of H. 6. Jane shore in that of E. 5. and many others about the same time.

or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force till lately, to the terror of all antient females in the kingdom; and many poor wretches were sacrificed thereby to the prejudice of their neighbours, and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of Lewis XIV. in France, who thought proper by an edict to
[62] restrain the tribunals of justice from receiving informations of witchcraft [o]. And accordingly it is with us enacted by statute 9 Geo. II. c. 5. that no prosecution shall for the future be carried on against any persons for conjuration, witchcraft, sorcery, or enchantment. But the misdemesnor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory. (11)

VII. A SEVENTH species of offenders in this class are all *religious impostors:* such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment [p].

VIII. SIMONY, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion; as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the per-

[o] Voltaire, *Siecl. Louis XIV.* ch. 29. Mod. Un. Hist. xxv. 215. Yet Voughlans (*de droit criminel*, 353. 459.) still reckons up sorcery and witchcraft among the crimes punishable in France.

[p] 1 Hawk. P.C. c. 5. b. 3.

(11) Mr. Christian observes, in a note on this passage, that a similar statute to that of James I. passed in Ireland in the reign of Elizabeth remains unrepealed; it has since been repealed by the 1 & 2 G. 4. c. 18. In the general pardon and amnesty which was passed by the parliament in 1651, all offences of invocations, conjurations, witchcrafts, sorceries, inchantments, and charms, were specially excepted. See Scobell, 181. See post, p. 169., the provisions of the Vagrant Act on this subject.

son presented [q]. The statute 31 Eliz. c. 6. (which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book [r]) enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years' value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same. (12) If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration. And persons who shall corruptly ordain or license any minister, or procure him to be ordained or licensed, (which is the true idea of simony,) shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ec- [63] clesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown. (13)

[q] 3 Inst. 156. See Vol. II. p. 279.

(12) The giver shall be incapable of enjoying the benefice; and the two years' value shall be accounted according to the rent at which it would let in the opinion of a jury, and not according to the taxation in the King's Books, or Parliamentary Survey, 3 Inst. 154.

(13) This seems not to be correctly stated; the statute (s. 2.) enacts, that if any person or persons, bodies politic or corporate, which have election or voice in the election of any fellow, &c. to have room or place in any church, college, &c. shall take money, fee, or reward for his or their voice or voices, assent or consent, then the place which *such person so offending* shall then have in any of the said churches, colleges, &c. shall be void; and that then, as well the queen as every other person and persons to whom the presentation, gift, &c. shall of right belong, of the room or place of the *said offender*, shall at their pleasure nominate to it, as if the offender were naturally dead. Under this section, the offender seems to be the person or corporation taking money, &c., though it is not easy to see how the penalty would apply to a corporation, or to an individual not having room or place in any of the churches, &c.; and the section, in this view of it, does not seem to vacate the election which may have been so corruptly made. Nor does the section devolve any turn to the crown, merely as such, but apparently either to the ordinary electors, or

IX. Profanation of the Lord's day, vulgarly (but improperly) called *sabbath-breaking*, is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows it's profanation, the keeping one day in seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and chearfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker. And therefore the laws of king Athelstan* forbad all merchandizing on the Lord's day, under very severe penalties. (14) And by the statute 27 Hen. VI. c. 5. no fair or market shall be held on the principal festivals, Good Friday, or any Sunday,) except the four Sundays in harvest,) on pain of forfeiting the goods exposed to sale. And since, by the statute 1 Car. I. c. 1., no persons shall assemble out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear-baiting, interludes, plays, or other *unlawful* exercises, or

c. 24.

at all events to those in whom the statutes of the foundation have placed it under such circumstances.

The third section provides for the case of a corrupt resignation, and election in consequence: it punishes the resigner by a forfeiture of the double value, not of the thing resigned, but of the corrupt consideration agreed to be received: it punishes the person elected by making him incapable of the place for that turn; and directs that they "to whom it shall appertain" may choose another person as if he by or for whom the corrupt consideration was agreed to be given were dead or had resigned.

(14) *Perdat pretium emptionis, et solvat* xxx *solidos pro mulcta.*—But these are by no means the severest penalties, which the Anglo-Saxon laws imposed on those who laboured or merchandized on the Lord's Day. See Wilk. 11. n. *e*.

pastimes; on pain that every offender shall pay 3*s.* 4*d.* to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the Lord's day, after divine service is over. But by statute 29 Car. II. c. 7. no person is allowed to *work* on the Lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5*s.* Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings. (15)

X. DRUNKENNESS is also punished by statute 4 Jac. I. c. 5. with the forfeiture of 5*s.*, or the sitting six hours in the stocks; by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholesome statutes, by way of prevention, chiefly passed in the same reign of king James I., which regulate the licensing of ale-houses, and punish persons found tippling therein, or the master of such houses permitting them.

XI. THE last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*; either by frequenting houses of ill-fame, which is an indictable offence[t]; or by some grossly scandalous and public indecency, [65]

[t] Poph. 208.

(15) There are several statutes which allow the necessary exercise of certain trades within certain limits on Sunday. By 10 & 11 W. 3. c. 24. mackarel may be sold before or after divine service. By the 59 G. 3. c. 36. and 1 & 2 G. 4. c. 50. bakers may bake and deliver meat, puddings, pies, tarts, or victuals, till half-past one in the afternoon, but they are prohibited from baking or selling any bread, rolls, or cakes on Sunday, except for travellers, or in case of urgent necessity, and they must not in any manner exercise their trade after half-past one. By the 11 & 12 W. 3. c. 21. 40 watermen are allowed to ply between Vauxhall and Limehouse, but they are to bring the earnings of the day to the rulers of the company on the Monday morning, who, after paying each man for his day's labour, shall set apart the surplus toward a fund for the use of decayed watermen and their widows. The 9 Ann. c. 23. permits chairmen and hackney coachmen to ply on Sundays. The 21 G. 3. c. 49. prohibits the opening on a Sunday of any house, or room, for public entertainment or debate, to which persons are admitted by payment of money.

for which the punishment is by fine and imprisonment. [v] In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy. [w] But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law (16); a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers. The temporal courts therefore take no cognizance of the crime of adultery, otherwise than as a private injury. [x]

[v] 1 Siderf. 168.
[w] Scobell. 121.
[x] See Vol. III. pag. 139.

(16) It is not intended by these general words to lay down that the offence of keeping a brothel is not punishable by the temporal courts, for undoubtedly the keeping such a house is a nuisance at common law, and punishable as other nuisances. See post, p. 167. The proceedings in respect of them are much facilitated by the 25 G. 2. c. 36. by which it is enacted, that if two inhabitants of any parish or place, paying scot and lot therein, shall give notice in writing to the constable of any person keeping a bawdy-house in such parish or place, the constable shall go with such inhabitants to a justice, and upon their making oath that they believe the notice to be true, and entering into a recognizance in 20*l.* each to produce material evidence against the person for such offence, the constable shall enter into a recognizance in the sum of 30*l.* to prosecute the same with effect, at the next sessions or assizes, as to such justice shall seem meet. Provision is made for the payment of the constable's expences in the prosecution, and also of 10*l.* to each of such inhabitants by the overseers of the parish.

The party accused is to be brought by warrant before the magistrate, and bound over to appear at the next sessions or assizes; and the magistrate may also take security for his good behaviour in the mean time.

The indictment cannot be removed by the defendant to any other court; and upon the trial, if it shall be proved that he has appeared to act as the master or person having the management of the house, he shall be deemed to be the keeper, though he may not be the real owner.

But, before we quit this subject, we must take notice of the temporal punishment for having *bastard children*, considered in a criminal light; for, with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large.[y] By the statute 18 Eliz. c. 3. two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be is not therein ascertained, though the contemporary exposition was that a corporal punishment was intended.[z] By statute 7 Jac. I. c. 4. a specific punishment (*viz.* commitment to the house of correction) is inflicted on the woman only. But in both cases, it seems that the penalty can only be inflicted if the bastard becomes chargeable to the parish; for otherwise the very maintenance of the child is considered as a degree of punishment. By the last-mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a second offence, till she find sureties never to offend again. (17)

[y] See Vol. I. pag. 458. [z] Dalt. Just. ch. 11.

(17) The 7 Jac. 1. c. 4., as to this purpose, is repealed by the 50 G. 3. c. 51., which enacts, that the mother of a bastard child, chargeable to the parish, may, after the expiration of one calendar month from her delivery, be committed by two justices for a time not exceeding twelve calendar months, nor less than six weeks; but when she has been confined six weeks, any two justices at the petty sessions for the division, wherein the parish charged is situate, may discharge her from farther confinement upon their own knowledge, or on certificate from the keeper of the house of correction of her good behaviour, and of the reasonable expectation of her reformation.

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CHAPTER THE FIFTH.

OF OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

THE law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world [a]; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. [b] This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. [c] And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those
[67] principles of natural justice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the

[a] *Ff.* 1. 1. 9.
[b] See Vol. I. p. 43.
[c] Sp. L. b. 1. c. 3.

contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of it's decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant [d], which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of. (1)

[d] See Vol. I. pag. 273.

(1) The word average has three significations: 1st, it means a partial loss of any thing insured. Thus, if the ship or goods, which are insured for a voyage, reach their destination, but are in some degree injured by any of the accidents insured against, this is an average loss, and the insurer is bound proportionately to compensate the insured. If, secondly, the master of a ship in distress throws overboard insured goods, with a view to preserve the whole ship and cargo, that is a total loss to the owner of those goods; but that loss so sustained for the general welfare is brought into a general average, and all who are concerned in the ship, freight, and cargo, must bear their proportional parts of it; which average loss so borne by them, their insurers, if they have any, must make good to them. This is a second meaning of the term. A third is that in which it signifies a small payment, which merchants who send goods in the ships of other men make to the master, over and above the freight, for his personal care and

But, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England;
[68] yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy.

I. As to the first, *violation* of *safe-conducts* or *passports*, expressly granted by the king or his embassadors [e] to the sub-

[e] See Vol. I. pag. 260.

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attention to the goods entrusted to him. Park on Insurance, 160. 7th edit.

Demurrage is an allowance which freightors make to the master of a ship, for the time which he may be detained in port loading or unloading their goods beyond that stipulated in their agreement.

For an explanation of bottomry, see Vol. II. p. 457., and of ransom bills, Vol. III. p. 436. (6).

jects of a foreign power in time of mutual war; or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by [69] the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as it is one of the articles of *magna carta* [f], that foreign merchants should be entitled to safe-conduct and security throughout the kingdom: there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2 Hen. V. st. 1. c. 6. breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons (when committed at sea) according to the ancient marine law then practised in the admiral's court; and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8., and repealed by 20 Hen. VI. c. 11., but revived by 29 Hen. VI. c. 2., which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have

[f] 9 *Hen. III. c.* 30. See Vol. I. pag. 259., *&c.*

restitution out of his effects, prior to any claim of the crown. And it is farther enacted by the statute 31 Hen. VI. c. 4. that if any of the king's subjects attempt or offend upon the sea, or in any port within the king's obeysance, against any stranger in amity, league, or truce, or under safe-conduct; and espe-
[70] cially by attaching his person, or spoiling him or robbing him of his goods; the lord chancellor, with any of the justices of either the king's bench or common pleas, may cause full restitution and amends to be made to the party injured.

It is to be observed, that the suspending and repealing acts of 14 & 20 Hen. VI. and also the reviving act of 29 Hen. VI. were only temporary, so that it should seem that after the expiration of them all, the statute 2 Hen. V. continued in full force; but yet it is considered as extinct by the statute 14 Edw. IV. c. 4. which revives and confirms all statutes and ordinances, made before the accession of the house of York, against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statute of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general statutes of Edw. VI. and queen Mary, for abolishing new created treasons; though sir Matthew Hale seems to question it as to treasons committed on the sea. [g] But certainly the statute of 31 Hen. VI. remains in full force to this day.

II. As to the rights of *embassadors*, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large. [h] It may here be sufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann. c. 12. that all process whereby the person of any embassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted by

[g] 1 Hal. P. C. 267. [h] See Vol. I. pag. 253.

confession or the oath of one witness, before the lord chancellor and the chief justices, or any two of them, shall be [71] deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit.[i] Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to sir Edward Coke[k], *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

By the antient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien to be felony only: but now, since the statute of treason, 25 Edw. III. c. 2. it is held to be only felony in a subject[l]. (2) Formerly it was only cog-

[i] See the occasion of making this statute, Vol. I. pag. 255.

[k] 3 Inst. 113.

[l] *Ibid.*

(2) Neither the author, nor Lord Coke, in the passages referred to, are to be understood as classing piracy among felonies, strictly so called. It was, and still is, a felony (if that term can be so used) at the civil law, but the common law took no cognisance of it, as being an offence committed out of its jurisdiction. The statute of H. 8. has not altered the nature of the offence, but only given a mode of trial by the common law. This distinction is important in many respects; for not being expressly made a felony by the statute, none of the incidents of felony beyond those named in the statute belong to it, and a general pardon of all felonies would not extend to it. The punishment, too, of accessories was left by that statute just as it found it: if they had committed their offence at sea, they were still only triable by the civil law; if on land, by no law at all, not by the civil, for that had no jurisdiction at land, nor at common law, for the principal offence not being made a felony, there could be no accessories to

nizable by the admiralty courts, which proceed by the rules of the civil law[m]. But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Hen. VIII. c. 15. established a new jurisdiction for this purpose, which proceeds according to the course of the common law, and of which we shall say more hereafter. (3)

[72] The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there[n]. But, by statute, some other offences are made piracy also: as by statute 11 & 12 W. III. c. 7., if any natural born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. (4) And farther, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts; or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall, for each of these offences, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal, or merely accessory, by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the statute 4 Geo. I. c. 11. expressly excludes the principals from the benefit of clergy. By the statute 8 Geo. I. c. 24. the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for

[m] 1 Hawk. P.C. c. 37. s. 18. [n] *Ibid.* c. 37. s. 4.

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to it. This was remedied by the 11 & 12 W. 3. c. 7. s. 10. and 8 G. 1. c. 24. as mentioned in the text below. See East's P.C. c. xvii. s. 3.

(3) See post, p. 269.

(4) The reason for passing the statute of 11 & 12 W. 3. c. 7. was to clear a point doubted by many civilians immediately after the revolution, whether James II. did not still retain in himself the right of war, so as to protect those who captured English vessels under his commission from the penalties of piracy.

that purpose, or in any wise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy: and such accessories to piracy as are described by the statute of king William are declared to be principal pirates; and all parties convicted by virtue of this act are made felons without benefit of clergy. By the same statutes also, (to encourage the defence of merchant vessels against pirates,) the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to be divided among [73] them, not exceeding one-fiftieth part of the value of the cargo on board: and such wounded seamen shall be entitled to the pension of Greenwich hospital; which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months' imprisonment. Lastly, by statute 18 Geo. II. c. 30. any natural born subject, or denizen, who in time of war shall commit hostilities at sea against any of his fellow subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate.

These are the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate punishment upon offences against that universal law, committed by private persons. We shall proceed in the next chapter to consider offences, which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crimes branches itself into a much larger extent than either of those of which we have already treated.

CHAPTER THE SIXTH.

OF HIGH TREASON.

THE third general division of crimes consists of such as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. In a former part of these commentaries[a] we had occasion to mention the nature of allegiance, as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was distinguished into two species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offence therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence: and these may be distinguished into four kinds; 1. Treason. 2. Felonies injurious to the king's prerogative. 3. *Praemunire*. 4. Other misprisions and contempts. Of which crimes, the first and principal is that of treason.

[75] TREASON, *proditio*, in it's very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the Mirror[b]: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the

[a] Book I. ch. 10. [b] c. 1. § 7.

king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord [c]. (1) This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary: these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears its crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio;* being equivalent to the *crimen laesae majestatis* of the Romans, as Glanvil [d] denominates it also in our English law.

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power [e]. And yet, by the ancient common law, there was a great latitude left in the breast of the judges to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason which never were suspected to be such. Thus the *accroaching*, or attempting to exercise, royal power, (a very uncertain charge,) was in the 21 Edw. III. held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects [76]

[c] *LL. Aelfredi. c.* 4. *Aethelst. c.* 4. *Canuti. c.* 54. 61.

[d] *l.* 1. *c.* 2.

[e] Sp. L. b. 12. c. 7.

(1) The expressions in the laws referred to are, *vitæ regis insidiari, insidias domino facere, regi vel domino insidiari.* So that not merely to destroy the life, but to attempt so to do, was treason, and that as it should seem equally in petit as in high treason. See Wilkins, pp. 55. 57. 142.

till he paid him 90*l.*[f]: a crime, it must be owned, well deserving of punishment; but which seems to be of a complexion very different from that of treason. (2) Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination[g]. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason[h]. But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Caesar, comprehended all the antient laws that had before been enacted to punish transgressors against the state[i]. This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "When a man doth compass or imagine the death of "our lord the king, of our lady his queen, or of their eldest "son and heir." Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects[j]: but the husband of such a queen is not comprised within these words,
[77] and therefore no treason can be committed against him[k]. The king here intended is the king in possession, without

[f] 1 Hal. P. C. 80.

[g] Britt. c. 22. 1 Hawk. P. C. c. 17. s. 1.

[h] *Qui de nece virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum, cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum, puniri jura voluerint) ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis.* (*Cod.* 9. 8. 5.)

[i] Gravin. *Orig.* 1. § 34.

[j] 1 Hal. P. C. 101.

[k] 3 Inst. 7. 1 Hal. P. C. 106.

(2) It was this judgment which seems to have led to the statute of treasons; a petition, in consequence of it, was presented in the same year by the Commons, praying for a declaration in Parliament, what is the accroachment of royal power; and though this was then evasively answered, yet the Commons ultimately succeeded. Reeves's History of the English Law, vol. ii. p. 450.

any respect to his title: for it is held, that a king *de facto* and not *de jure*, or, in other words, an usurper that hath got possession of the throne, is a king within the meaning of the statute: as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and therefore treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure*, and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed.[l] And a very sensible writer on the crown law carries the point of possession so far, that he holds[m], that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty of forfeiture, which do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration; and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown, (a term, by the way, of very loose and indistinct signification,) the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry the seventh does by no means *command* any opposition to a king *de jure*; [78] but *excuses* the obedience paid to a king *de facto*. When therefore an usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance: otherwise, under an usurpation, no man could be safe: if the lawful prince had a right to hang him for obedience to the powers

[l] 3 Inst. 7. 1 Hal. P.C. 104. [m] 1 Hawk. P.C. c. 17. s. 16.

in being, as the usurper would certainly do for disobedience. Nay, farther, as the mass of people are imperfect judges of title, of which in all cases possession is *primâ facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose his favour, and decide the ambiguous claim: and, therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is, according to sir Matthew Hale, no longer the object of treason [n]. And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed [o], when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king.

Let us next see, what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will [p], and not, as in common speech, the carrying such design to effect.[q] And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium*, without any traitorous intent, is no treason: as was the case of sir Walter Tyrrel, who, by the command of king William Rufus shooting at a hart, the arrow glanced against a tree, and killed the
[79] king upon the spot.[r] But, as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act. (2) And yet the tyrant Dionysius is recorded [s] to have

[n] 1 Hal. P. C. 104.

[o] Vol. I. pag. 212.

[p] By the antient law *compassing* or intending the death of any man, demonstrated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)

[q] 1 Hal. P. C. 107.

[r] 3 Inst. 6.

[s] Plutarch. *in vit.*

(2) Still it is this act of the mind, which is the substantive treason, and must be charged to be so in the indictment; the overt acts are the means by which the act of the mind becomes capable of proof, and is proved. See ante, p. 35. Foster, 194. With regard to Tyrrel, I hardly know whether

executed a subject, barely for dreaming that he had killed him; which was held of sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires, that the accused "be thereof upon sufficient proof attainted of some "open act by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death.[t] To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death[u]; for all force, used to the person of the king, in it's consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason.[w]

How far mere *words*, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the fourth, of persons executed for treasonable words: the one a citizen of [80] London, who said he would make his son heir of the *crown*, being the sign of the house in which he lived; the other a

[t] 3 Inst. 12.
[u] 1 Hal. P.C.109.
[w] 1 Hawk. P.C. c. 17. s. 9. 1 Hal. P.C.119.

whether it is worth observing, that it is extremely doubtful if he was the author of William's death. There was no evidence against him; and long after he had ceased to have any thing to hope or fear from the discovery, he swore that he never saw the king on the day of his death, or entered that part of the forest in which he fell. There are several circumstances which make it probable that William did not perish by an accidental wound, and certainly if Tyrrel was a traitor, he did not reap the fruits of his treason. See Lingard's and Turner's Histories.

gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases: and the chief justice Markham rather chose to leave his place than assent to the latter judgment.[x] But now it seems clearly to be agreed, that by the common law and the statute of Edward III. words spoken amount only to a high misdemesnor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connection with other words, and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly in 4 Car. I. on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, "that "though the words were as wicked as might be, yet they "were no treason: for unless it be by some particular statute, no words will be treason."[y] (3) If the words be set down in writing, it argues more deliberate intention: and it has been held that writing is an overt act of treason; for *scribere est agere*. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted it's author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached[z]; and of Algernon Sydney, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt
[81] acts of that treason, which was specially laid in the indictment.[a] But being merely speculative, without any intention (so far as

[x] 1 Hal. P.C. 115.
[y] Cro. Car. 126.
[z] *Ibid.*
[a] Foster, 198.

(3) This must be understood of such words as are described in the beginning of the paragraph, loose words, "not relative to any treasonable act or design then in agitation." For words of advice, or persuasion, and all consultations for the traitorous purposes before mentioned are certainly overt acts of treason. Fost. 200.

appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned: and though Sydney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law[b]; though of late even that has been questioned. (4)

2. THE second species of treason is, "if a man do violate the "king's companion, or the king's eldest daughter unmarried, "or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force, as with it: and this is high treason in both parties, if both be consenting; as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious (5): and,

[b] 1 Hal. P. C. 118. 1 Hawk. P. C. c. 17.

(4) The queen in this first species of treason, means the queen consort, and extends to a wife *de facto*, but only during coverture: there is no doubt that a queen divorced *a vinculo matrimonii* is not within the statute; whether a divorce *a mensa et toro* only would exclude seems doubtful; the term in the statute is madame *sa compaigne*. Under the words "eldest son and heir," is included, whoever shall be the eldest son and heir apparent to a king or queen regnant at the time of the treason done. What will be an overt act of compassing the death of either of these persons, must be determined, not precisely on the same principles which have been laid down respecting the king or queen regnant; the attempt must be upon *their persons*, not merely against their state and dignity. Lord Hale defines it thus, where a man without due process of law expressly compasseth the wounding or death of them. H.P.C. 128. 1 East. P. C. c. 2. s. 10.

(5) Mr. Christian points out the insufficiency of this reason; the children of the second, and every other son would succeed to the crown before those of the eldest daughter, and yet their wives are not protected; her chastity too is only guarded while she remains unmarried, and while any child she might bear could not inherit. Dr. Lingard supplies a conjecture, which at least is ingenious, and free from the same objections. The king, as feudal lord, might demand an aid from his tenants at the marriage of his eldest daughter, and at the marriage of her only; of course he was the less likely to marry her, if she was deflowered; and this may have been the cause of inserting her name specially. Hist. of Engl. iv. 155.

therefore, when this reason ceases, the law ceases with it; for to violate a queen or princess-dowager is held to be no treason[c]: in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife or daughter of his lord[d]; but not so, if he only vitiated his widow.[e]

3. The third species of treason is, "if a man do levy war "against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under
[82] pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended.[f] For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority.[g] But a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other, (in that spirit of private war, which prevailed all over Europe[h] in the early feodal times,) it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Gloucester in 20 Edw. I. who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemesnor.[i] A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the

[c] 3 Inst. 9.
[d] *Feud. l.* 1. *t.* 5.
[e] *Ibid. t.* 21.
[f] 1 Hawk. P.C. c. 17. s. 25.
[g] 1 Hal. P.C. 132.
[h] Robertson Ch. V. i. 45. 286.
[i] 1 Hal. P.C. 136.

king or his government) it falls within the first, of compassing or imagining the king's death.[k] (6)

4. "If a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence (7), by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like.[l] By enemies are here understood the subjects of foreign [83] powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom[m], or else in that of levying war against his majesty. And, most indisputably,

[k] 3 Inst. 9. Foster. 211. 213. [l] 3 Inst. 10. [m] Foster, 219.

(6) By the 36 G. 3. c. 7. (enacted only for the late king's life, but as to this purpose, made perpetual by the 57 G. 3. c. 6.) it is provided that if any one within the realm, or without, shall compass or intend death, destruction, or any bodily harm tending thereto, maiming, or wounding, imprisonment, or restraint of H. M., or to depose him from the style, honour, or kingly name of the imperial crown of these realms, or o levy war against him within this realm, in order by force or constraint, to compel him to change his measures or counsels, or in order to put any constraint upon, or intimidate both, or either house of parliament, or to move or stir any forcigner with force to invade this realm, or any of his majesty's dominions, and such compassing or intentions shall express by publishing any printing or writing, or by any other overt act; being convicted thereof upon the oaths of two witnesses upon trial, or otherwise, by due course of law, such person shall be adjudged a traitor, and suffer death, and forfeit as in cases of high treason. Perhaps all the offences enumerated in this statute, were already chargeable as overt acts of compassing the death of the king; but this makes them substantive treasons; and thereby (to use the words of Abbott C. J.), "the law is rendered more clear and plain, both to those who are bound to obey it, and to those who may be engaged in the administration of it." Charge to the grand jury on the special commission, March 27, 1820.

(7) The intelligence need not actually reach the enemy Mr. J. Foster observes, that the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted. P. 217.

the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king.[n] But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an *enemy*: an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England.[n] And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a safe opportunity.[o] (8)

5. "IF a man counterfeit the king's great or privy seal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it on another, this is held to be only an abuse of the seal, and not a counterfeiting of it: as was the case of a certain chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the
[84] label going through both the skins. He then dissolved the cement; and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and sir Edward Coke[p] mentions it with some indignation, that the party was living at that day. (9)

[n] Foster, 216.
[o] 1 Hawk. P. C. c. 17. s. 28.
[p] Foster, 216.
[q] 3 Inst. 16.

(8) But an apprehension, though ever so well grounded, of having houses burnt, or estates wasted, or cattle destroyed, or of any other mischief of the like kind, will not excuse in the case of joining and marching with rebels or enemies. Foster, 217.

(9) Even after the making, and delivery of a new seal, and the breaking of the old one, it is high treason to counterfeit the latter, and apply it to an instrument of no date, or of a date when it was in use. 1 Hale, H. P. C. 177 To constitute the offence, however, in any case, there must be an actual application of the counterfeit, so as to produce an impression in testimony

6. The sixth species of treason under this statute, is "if a "man counterfeit the king's money; and if a man bring false "money into the realm counterfeit to the money of England, "knowing the money to be false, to merchandize and make "payment withal."[q] As to the first branch, counterfeiting the king's money; this is treason, whether the false money be uttered in payment or not. Also if the king's own minters alter the standard or alloy established by law, it is treason. But gold and silver money only are held to be within the statute.[q] With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the statute.[r] But of this we shall presently say more. (10)

[q] 1 Hawk. P. C. c. 17. s. 57. [r] *Ibid.* c. 17. s. 83. 1 Hal. P. C. 231.

mony of some writing; the mere making a seal similar to the original, though with intent so to apply it, is only a compassing to counterfeit, and punishable as a misdemeanour. *Ibid.* 183.

(10) Other important questions arise upon this clause of the statute, which it may be convenient to notice shortly in this place. 1st. What is the extent of the term, "king's money?" Before the union with Ireland, this point was much discussed in respect of gold and silver money coined and issued in that kingdom; and the better opinion seems to have been upon principle, and the comparison of this with later statutes, that such money was king's money, and the counterfeiting of it high treason. The arguments upon which this conclusion is founded, will apply equally to the case of money coined by the king's authority in any other part of his dominions, and not restrained in its circulation to that part. There is certainly this difficulty attending this conclusion, that a person may have no knowledge that the money he so counterfeits is the king's money, and therefore may incur the penalties of high treason unwittingly; at the present day, indeed, there is no hardship in this, for later statutes have made the counterfeiting even of foreign coin, whether current or not, in this realm, highly penal, and the man who does an act, which he knows to be illegal, cannot complain, if it involves him in consequences more serious than he anticipated. But as these statutes cannot be taken into the account in a question on an older statute, the only answer which the difficulty seems to admit of, is that legally the subject is bound to know the king's coin; and that the same ignorance might in fact subsist, either as to very ancient, or very recent coins, issued in England itself, and yet there can be no doubt that the act itself of counterfeiting them would be high-treason.

2d. What is the meaning of the term, "money of England?" And it is said, that by this, is to be understood all such money as is coined and issued by the authority of the crown of England, in any part of the dominions of England; for the law would be inconsistent, unless the second clause made it treason to import the same counterfeit money, which the first had made it treason to counterfeit. It is obvious, however, that this argument

7. The last species of treason ascertained by the statute, is "if a man slay the chancellor, treasurer, or the king's justices "of the one bench or the other, justices in eyre, or justices of "assize, and all other justices assigned to hear and determine, "being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not wounding, or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of the exchequer, as such, are not within the protection of this act[a]: but the lord keeper or commissioners of the great seal now seem to be within it, by virtue of the statutes 5 Eliz. c. 18. and 1 W. & M. c. 21. (11)

[a] 1 Hal. P. C. 231.

argument admits of a different application, and the restricted term, "money of England," may as well be used to restrain the general term, "king's money," as this latter to enlarge the former.

3d. From what place must the importation be? And as to this, it was determined very early, that an importation from Ireland, then an independent member of the crown, was not within the statute, but that the clause was levelled against importation, where the counterfeiting itself was not punishable, that is, where it took place in the dominions of another sovereign. And it is now understood, that the same rule extends to exclude all the plantations and dominions of England, where the same laws are in force, by which the counterfeiter himself is punishable.

4th. A fourth question arises not only upon this, but all the statutes on the same subject; namely, what degree of resemblance to the true coin in the counterfeit piece, is necessary to constitute the offence of counterfeiting? This is a question of fact, but the principle seems to be that there must be resemblance enough to give the coin circulation, and impose upon the world generally, but that the resemblance need not be perfect. Thus, where the counterfeit impressions were exact, but in one case, the coin was not round, and in another there was an awkward roughness upon the edges, so that the coins would be taken by nobody, it was held that the offences were not complete. And on the other hand, where the counterfeit shilling was "quite smooth, without the smallest vestige of either head or tail," but at the same time was very like those shillings, the impression on which had been worn away by time, and might have been readily taken by ordinary persons for such, the offence was held to be sufficiently committed. Varley's case. Wooldridge's case, Leach, 76. 308. Wilson's case, Leach, 285. East's P. C. c. iv. ss. 4, 5, 6.

(11) Although it is part of the commission of justices of the peace, to hear and determine certain felonies, they are not within the statute, which applies to such justices only as have a commission of oyer and terminer, as the

THUS careful was the legislature, in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason, that had formerly prevailed in our courts. But the act does not stop here, but goes on. "Because other "like cases of treason may happen in time to come, which "cannot be thought of nor declared at present, it is accorded, "that if any other case supposed to be treason, which is not "above specified, doth happen before any judge; the judge "shall tarry without going to judgment of the treason, till the "cause be shewed and declared before the king and his parlia- "ment, whether it ought to be judged treason or other "felony." Sir Matthew Hale[t] is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason, but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty *memento* to judges to be careful and not over-hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by a new declarative act; and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

IN consequence of this power, not indeed originally granted by the statute of Edward III., but constitutionally inherent in every subsequent parliament, (which cannot be abridged of any rights by the act of a precedent one,) the legislature was extremely liberal in declaring new treasons in the unfortunate reign of king Richard the second; as, particularly the killing

[t] 1 Hal. P. C. 259.

the principal designation of their office. 1 Hale, H.P.C. 231. With respect to the exclusion of the barons of the exchequer, there is some disagreement among the text writers. Lord Hale, in the passage referred to, takes no particular notice of the case, but merely says that the statute extends to no other officers than those named. For the operation of the statutes of Elizabeth, and William and Mary, see Vol. III. p. 47, 48. n. (10).

of an embassador was made so; which seems to be founded upon better reason than the multitude of other points, that were then strained up to this high offence: the most arbitrary and absurd of all which was by the statute 21 Ric. II. c. 3., which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed[u], reciting, "that no man "knew how he ought to behave himself, to do, speak, or say, "for doubt of such pains of treason; and therefore it was "accorded, that in no time to come any treason be judged "otherwise than was ordained by the statute of king Edward "the third." This at once swept away the whole load of extravagant treasons introduced in the time of Richard the second.

But afterwards, between the reign of Henry the fourth and Queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offences of clipping money; breaking prison or rescue, when the prisoner is committed for treason (12); burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king, calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Ann of Cleve; derogating from the king's royal style and title; impugning his supremacy; and assembling riotously to the
[87] number of twelve, and not dispersing upon proclamation: all which new-fangled treasons were totally abrogated by the statute 1 Mar. c. 1. which once more reduced all treasons to

[u] Stat. 1 Hen. IV. c. 10.

(12) This was not so violent a departure from the spirit of the law, as the other cases here mentioned. See post, p. 130, 131.

the standard of the statute 25 Edw. III. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number is very considerably increased, as we shall find upon a short review. (13)

THESE new treasons, created since the statute 1 Mar. c. 1. and not comprehended under the description of statute 25 Edw. III., I shall comprise under three heads: 1. Such as relate to papists. 2. Such as relate to falsifying the coin or other royal signatures. 3. Such as are created for the security of the protestant succession in the house of Hanover.

1. THE first species, relating to *papists*, was considered in a preceding chapter, among the penalties incurred by that branch of non-conformists to the national church; wherein we have only to remember, that by statute 5 Eliz. c. 1. to defend the pope's jurisdiction in this realm is, for the first time, a heavy misdemesnor: and, if the offence be repeated, it is high treason. Also by statute 27 Eliz. c. 2. if any popish priest, born in the dominions of the crown of England, shall come over hither from beyond the seas, unless driven by stress of weather[w], and departing in a reasonable time[x]; or shall tarry here three days without conforming to the church, and taking the oaths; he is guilty of high treason. And by statute 3 Jac. I. c. 4. if any natural-born subject be withdrawn from his allegiance, and reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high trea-

[w] Sir T. Raym. 377. [x] Latch. 1.

(13) The 1 M. c. 1, was, as Mr. Christian has observed, a confirmation of a more important statute, 1 E. 6. c. 12.; but as in the reign of Edward, some new treasons were created, it had also the further effect of repealing them. Mary herself, however, created several treasons; the 1 & 2 Ph. & M. c. 9. made it treason in principals, procurers, and abettors, for any person to *have prayed since the commencement of the session, or hereafter to* pray or desire that God would shorten the queen's days, or take her out of the way, or any such malicious prayer amounting to the same effect. Dr. Lingard, who is the best authority in such a case, states that the act was occasioned by Ross, a celebrated protestant preacher, who openly prayed that God would either convert the heart of the queen, or take her out of this world. The retrospective clause, which was, perhaps, not strictly necessary, was of course intended to include the case of Ross: Lingard, vii. 262.

son. These were mentioned under the division before referred to, as spiritual offences, and I now repeat them as temporal ones also; the reason of distinguishing these overt acts of popery from all others, by setting the mark of high treason upon them, being certainly on a civil, and not on a religious, account. For every popish priest of course renounces his
[88] allegiance to his temporal sovereign upon taking orders; that being inconsistent with his new engagements of canonical obedience to the pope; and the same may be said of an obstinate defence of his authority here, or a formal reconciliation to the see of Rome, which the statute construes to be a withdrawing from one's natural allegiance; and, therefore, besides being reconciled "to the pope," it also adds, "or any other "prince or state." (14)

2. With regard to treasons relative to the *coin* or other *royal signatures*, we may recollect that the only two offences respecting the coinage, which are made treason by the statute 25 Edw. III., are the actual counterfeiting the gold and silver coin of this kingdom; or the importing such counterfeit money with intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance, by infringing the king's prerogative, and assuming one of the attributes of the sovereign to whom alone it belongs to set the value and denomination of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falsifies this is an offender against the state, by contributing to render that public faith suspected. (15) And upon the same reasons, by a law of the emperor Constantine [y], false coiners were declared guilty of high treason, and were condemned to be burnt alive: as, by the laws of Athens [z] all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned, that this method of reasoning is a

[y] *C.* 9. 24. 2. *Cod. Theod. de falsa moneta, l.* 9. [z] Pott. Ant. b. 1. c. 26.

(14) See ante, p. 58 (15) See Vol. I. p. 278.

little overstrained; counterfeiting or debasing the coin being usually practised, rather for the sake of private and unlawful lucre, than out of any disaffection to the sovereign. And therefore both this and its kindred species of treason, that of [89] counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery,) in which they are followed by Glanvil [a], Bracton [b], and Fleta [c],) than by Constantine and our Edward the third, a species of the *crimen laesae majestatis* or high treason. For this confounds the distinction and proportion of offences; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III. the offence of counterfeiting the coin was held to be only a species of petit treason [d]; but subsequent acts in their new extensions of the offence have followed the example of that statute, and have made it equally high treason with an endeavour to subvert the government, though not quite equal in its punishment.

In consequence of the principle thus adopted, the statute 1 Mar. c. 1. having at one stroke repealed all intermediate treasons created since the 25 Edw. III., it was thought expedient by statute 1 Mar. st. 2. c. 6. to revive two species thereof, *viz.* 1. That if any person falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2. shall falsely forge or counterfeit the sign manual, privy signet, or privy seal; such offences shall be deemed high treason (16). And by statute 1 & 2 P.& M. c. 11. if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money referred

[a] *l.* 14. *c.* 7.
[b] *l.* 3. *c.* 3. § 1 & 2.
[c] *l.* 1. *c.* 22.
[d] 1 Hal. P. C. 224.

(16) The 7 Ann. c. 21. s. 9. has made it high treason to counterfeit any of the seals continued to be used in Scotland according to the 24th article the union.

to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by con-
[90] sent, as approaching the nearest to our standard: and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit it is not high treason, but another inferior offence. Clipping or defacing the genuine coin was not hitherto included in these statutes; though an offence equally pernicious to trade, and an equal insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subjects. And therefore among the Romans [e], defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the like sort, according to that vague conclusion, "*aliudve quid simile* "*si admiserint.*" And now, in England, by statute 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged to be high treason; and by statute 18 Eliz. c. 1. (because "the same law, being "penal, ought to be taken and expounded strictly according "to the words thereof, and the like offences not by any equity "to receive the like punishment or pains,") the same species of offences is therefore described in other more general words; *viz.* impairing, diminishing, falsifying, scaling, and lightening; and made liable to the same penalties. By statute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money; or shall convey the same out of the king's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason, which is by much the severest branch of the coinage law. The statute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwise in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. But all prosecutions on this act are to be

[e] *Ff.* 48. 4. 6.

commenced within *three* months after the commission of the offence: except those for making or mending any coining tool or instrument, or for marking money round the edges; which are directed to be commenced within *six* months after the offence committed[f]. And, lastly, by statute 15 Geo. II. c. 28. if any person colours or alters any shilling or sixpence, either lawful or counterfeit, to make them respectively resemble a guinea or half-guinea; or any halfpenny or farthing to make them respectively resemble a shilling or sixpence; this is also high treason: but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind.

3. THE other new species of high treason is such as is created for the security of the *protestant succession* over and above such treasons against the king and government as were comprized under the statute 25 Edw. III. For this purpose, after the act of settlement was made for transferring the crown to the illustrious house of Hanover, it was enacted by statute 13 & 14 W. III. c. 3. that the pretended prince of Wales, who was then thirteen years of age, and had assumed the title of king James III. should be attainted of high treason; and it was made high treason for any of the king's subjects, by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II. c. 39. it is enacted, that if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason, in the same manner as it was to correspond with the father. By the statute 1 Ann. st. 2. c. 17. if any person shall endeavour to deprive or hinder any person, being the next in succession to the crown, according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. [92] And by statute 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and

[f] Stat. 7 Ann. c. 25.

affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall be guilty of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason by statute 13 Eliz. c. 1. during the life of that princess. And after her decease it continued a high misdemesnor, punishable with forfeiture of goods and chattels, even in the most flourishing aera of indefeasible hereditary right and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet, entitled "*vox populi vox Dei*[g]."

THUS much for the crime of treason, or *laesae majestatis*, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this it's primitive idea. But of this enough has been hinted already; it is now time to pass on from defining the crime to describing its punishment.

THE punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance [h], at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement[i]. 2. That he be hanged by the neck, and then cut down alive. 3. That his
[93] entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal[k].

[g] State Tr. IX. 680.
[h] 33 Ass. pl.7.
[i] 1 Hal. P. C. 382.
[k] This punishment for treason, sir Edward Coke tells us, is warranted by divers examples in Scripture; for

THE king may, and often doth discharge all the punishment, except beheading, especially where any of noble blood are attainted. For, beheading being part of the judgment, that may be executed, though all the rest be omitted by the king's command [l]. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another [m]. But of this we shall say more hereafter [n]

IN the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn and hanged by the neck till dead [o]. But in treasons of every kind the punishment of women is the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sensation as the other) is to be drawn to the gallows, and there to be burned alive [p]. (17)

THE consequence of this judgment (attainder, forfeiture, and corruption of blood) must be referred to the latter end of this book, when we shall treat of them altogether, as well in treason as in other offences.

Joab was drawn, Bigthan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)

[l] 1 Hal. P.C. 351.
[m] 3 Inst. 52.
[n] See ch. 32.
[o] 1 Hal. P. C. 351.
[p] 2 Hal. P.C. 399.

(17) By the 30 G. 3. c. 48. this punishment of burning women for high or petit treason is abolished, and hanging by the neck is substituted; and by the 54 G. 3. c. 146., in all cases of high treason where the punishment would have been that first described in the text, the sentence now to be awarded is drawing on a hurdle, hanging by the neck till dead, beheading and quartering. But after judgment his majesty may, by warrant, under the sign manual, countersigned by a principal secretary of state, direct that the traitor shall not be drawn nor hanged, but be beheaded alive, and may in such warrant direct how the body, head, and quarters, shall be disposed of. By the French law high treason, when it consists in an attempt or conspiracy against the life or person of the King, is punished as parricide, with the addition of the forfeiture of the party's goods. See post, 203. n. Code penal, l. iii. t. 1. s. 86.

CHAPTER THE SEVENTH.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

AS, according to the method I have adopted, we are next to consider such felonies as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of *felony*; before we proceed upon any of the particular branches into which it is divided.

FELONY, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies which are called clergyable, or to which the benefit of clergy extends, were antiently punished with death, in all lay, or unlearned offenders; though now by the statute-law that punishment is for the first offence universally remitted. Treason itself, says sir Edward Coke[a], was antiently comprized under the name of felony: and in confirmation of this we may observe that the statute of treasons, 25 Edw. III. c. 2., speaking of some
[95] dubious crimes, directs a reference to parliament, that it may be there adjudged, "whether they be treason, or *other* felony." All treasons therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that not only all offences, now capital, are in some degree or other felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley,

[a] 3 Inst. 15.

or in self-defence; and petit larceny or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeiture[a]. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; *viz.* an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word *felony* or *felonia*, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek φηλος, an impostor or deceiver; others from the Latin *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology[b]; that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions a forfeiture of all the offender's lands or goods. And this gives great probability to sir Henry Spelman's Teutonic or German derivation of it[c]: in which language indeed, as the word is clearly of feodal original, we ought rather to look for it's signification than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words; fee, which signifies (we well know) the fief, feud, or beneficiary estate: and lon, which signifies price or value. Felony is therefore the same as *pretium feudi*, the consideration for which a man [96] gives up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. In this sense it will clearly signify the feodal forfeiture, or act by which an estate is forfeited, or escheats to the lord.

To confirm this we may observe, that it is in this sense, of forfeiture to the lord, that the feodal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates[d], are styled *felonia* in the feodal law: "*scilicet*, *per quas feudum*

[a] 1 Inst. 391. [b] Glossar. *tit. Felon.* [d] See Vol. II. pag. 284.

"*amittitur*[e]." As, "*si domino deservire noluerit*[f]; *si per an-*
"*num et diem cessaverit in petenda investitura*[g]; *si dominum*
"*ejuraverit, i. e. negaverit se a domino feudum habere*[h]: *si a*
"*domino, in jus eum vocante, ter citatus non comparuerit*[i];" all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feodal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord[k]; vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e. cum uxore ejus concu-*
"*buerit*[l];" all these are esteemed felonies, and the latter is expressly so denominated, "*si fecerit feloniam, dominum forte*
"*cucurbitando*[m]." And as these contempts, or smaller offences, were felonies, or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seignory to the vassal, by the same acts as the vasal would have forfeited his feud by to the lord. "*Si dominus*
"*commiserit feloniam, per quam vasallus amitteret feudum si eam*
"*commiserit in dominum, feudi proprietatem etiam dominus*
"*perdere debet*[n]." One instance given of this sort of felony in the lord is beating the servant of his vasal, so as that he loses his service; which seems merely in the nature of a civil
[97] injury, so far as it respects the vasal. And all these felonies were to be determined "*per laudamentum sive judicium parium*
"*suorum*" in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feodal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small deflection from the original sense, such, as induced the forfeiture of goods, also) were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies; that is, the consequence of such crimes was forfeiture;

[e] *Feud. l.2. t.16. in calc.*
[f] *Ibid. l.1. t.21.*
[g] *Ibid. l.2. t.24.*
[h] *Ibid. l.2. t.34. l.2. t.26. § 3.*
[i] *Ibid. l.2. t.22.*
[k] *Feud. l.2. t. 24. § 2.*
[l] *Ibid. l. 1. t.5.*
[m] *Ibid. l.2. t. 38. Britton. l.1. c.22.*
[n] *Ibid. l.2. t. 26. & 47.*

till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in antient times was held to be a species of felony: *viz.* because it induced a forfeiture.

HENCE it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny: and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods[o], an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment; which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture; for, as sir Edward Coke justly observes[p], in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only.

THE idea of felony is indeed so generally connected with [98] that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law[q] implies that it shall be punished with death, *viz.* by hanging as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have, provided the same is not expressly taken away by statute. And, in compliance herewith, I shall for the future consider it also in the same light, as a generical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which seem at first view repug-

[o] 3 Inst. 43. [p] 1 Inst. 391.
[q] 1 Hawk. P.C. c. 40. s. 7. 2 Hawk. P.C. c. 38. s. 24.

nant to the general idea which we now entertain of felony, as a crime to be punished by death: whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I proceed now to consider such felonies, as are more immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of embezzling or destroying the king's armour or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war.

1. Offences relating to the *coin*, under which may be ranked some inferior misdemesnors not amounting to felony, are thus declared by a series of statutes which I shall recite in the order of time. And, first, by statute 27 Edw. I. c. 3. none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of forfeiture of life and goods. (1) By statute 9 Edw. III. st. 2. no sterling money
[99] shall be melted down, upon pain of forfeiture thereof. By statute 17 Edw. III. none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and member by the persons importing, and the searchers permitting such importation. By statute 3 Hen. V. st. 1. to make, coin, buy, or bring into the realm any gally-halfpence, suskins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks* is forfeiture of an hundred shillings. (2) By statute 14 Eliz. c. 3. such as forge

Stat. 2 Hen. VI. c. 9.

(1) Pollards, crockards, scaldings, brabants, eagles, leonines, and pieces of many other denominations, were base coins, white in colour, compounded of silver, copper, and sulphur, introduced into the country by foreign merchants in large quantities. See Ruding. i. 386.

(2) Gally-halfpence are supposed to have been so called from their being imported into the realm by Venetian and Genoese merchants, who navigated in gallies; the suskin was the Flemish seskin, or piece of six mites; the dotkin, the Holland doitkin, or duitkin, from which we now retain the word doit, to signify the smallest possible denomination of money; the blank, which was put down by 2 H. 6., is supposed to have been a base

any foreign coin, [of gold or silver,] although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason: a crime which we shall hereafter consider. (3) By statute 13 & 14 Car. II. c. 31. the offence of melting down any current silver money shall be punished with forfeiture of the same, and also the double value: and the offender, if a freeman of any town, shall be disfranchised; if not, shall suffer six months' imprisonment. By statute 6 & 7 W. III. c. 17. if any person buys or sells, or knowingly has in his custody, any clippings, or filings, of the coin, he shall forfeit the same and 500*l.*; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By statute 8 & 9 W. III. c. 26. if any person shall blanch or whiten copper for sale (which makes it resemble silver); or buy or sell or offer to sell any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but be beneath the standard: or if any person shall receive or pay at a less rate than it imports to be of (which demonstrates a consciousness of it's baseness, and a fraudulent design) any counterfeit or diminished milled money of this kingdom, not being cut in pieces; (an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person, to whom any gold or silver money is tendered, is empowered by statutes 9 & 10 W. III. c. 21., 13 Geo. III. c. 71., and 14 Geo. III. c. 70., to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform:) all such persons shall be guilty of felony; and may be prosecuted for the same at any time within three months after the offence committed. But [100] these precautions not being found sufficient to prevent the

white coin struck by Hen. V. in France, after his appointment to the regency according to the treaty of Troyes. Ruding. i. 492. 499. ii. 7.

(3) But by the 37 G. 3. c. 126. the making, coining, counterfeiting, or importing into the realm, knowing it to be counterfeit, and with intent to utter, any kind of coin not the proper coin of this realm, nor permitted to be current here, (*i. e.* not permitted by proclamation under the great seal,) but resembling, or intended to resemble any gold or silver coin of any foreign state, is made felony punishable with transportation for any term of years not exceeding seven.

uttering of false or diminished money, which was only a misdemesnor at common law, it is enacted by statute 15 Geo. II. c. 28. that if any person shall utter or tender in payment any counterfeit coin, knowing it so to be, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour for six months more; for the second offence, shall be imprisoned two years, and find sureties for two years longer; and for the third offence, shall be guilty of felony without benefit of clergy. Also, if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money, and shall for the first offence be imprisoned one year, and find sureties for his good behaviour for two years longer; and for the second, be guilty of felony without benefit of clergy. By the same statute it is also enacted, that, if any person counterfeits the copper coin, he shall suffer two years' imprisonment, and find sureties for two years more. By statute 11 Geo. III. c. 40. persons counterfeiting copper halfpence or farthings, with their abettors; or buying, selling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to be of; shall be guilty of single felony. (4) And by a temporary statute (14 Geo. III. c. 42.) if any quantity of money, exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported

(4) The effect of this statute, thus changing a misdemeanour into a felony, has been incidentally to diminish the punishment; the fixed punishment for this offence by the 15 G. 2. c. 28. s. 6. having been two years' imprisonment, whereas the imprisonment for a clergyable felony cannot exceed one year, unless where otherwise specially provided. The 37 G. 3. c. 126. extended the provisions of these acts from halfpence and farthings to all such pieces of copper money as shall be coined and issued by the king, and as shall by his royal proclamation, be ordered to be deemed and taken as current money of this realm. The 43 G. 3. c. 139. provides against the counterfeiting of foreign copper coin, or of other metal of less value than silver, not ordered by proclamation to be taken as current money of the realm, making the offence a misdemeanour, punishable the first time by imprisonment for any term not exceeding a year, and the second by transportation for seven years.

into Great Britain or Ireland, the same shall be forfeited in equal moities to the crown and prosecutor. Thus much for offences relating to the coin, as well misdemesnors as felonies, which I thought it most convenient to consider in one and the same view. (5)

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(5) The 14 G. 3. c. 42. was revived and made perpetual by the 39 G. 3. c. 75., but so much of both as relate to the provision stated in the text for the forfeiture of light silver coin, is repealed by the 56 G. 3. c. 68.

Before closing this head of offences, it is right to notice that, however the counterfeiting, impairing, and importing of base money had been provided for, there seems to have been no distinct provision against the exportation of base money to the foreign dominions of the king till the 38 G. 3. c. 67. This statute has made it an offence to export, or put on board any vessel, or even to have the custody of, any such coin for the purpose of exportation to any of his majesty's islands or colonies in the West Indies or America, punishable by a forfeiture of the coin, 200*l.*, and the double of the value of the coin.

The number of statutes on the subject of the coin, which, after all, leave some offences unprovided for, and to be treated as common law misdemesnors, makes this one of the most perplexing and intricate titles of the criminal law. The expediency of a revision, and consolidation of them cannot be doubted; it would be found possible to repeal a great many, and leave the offences mentioned in them to the operation of the common law; and it would be easy very much to simplify their provisions, and free them from many inconsistencies. I have not attempted in a note to mention the numerous points that have been decided on them, because it would be impossible to do so usefully within any reasonable limits.

It is proper, however, to notice a class of offences connected with this subject, which existed when the author wrote, but which he has omitted to give any account of.

The 9 E. 3. st. 2. c. 1. and the 17 E. 3. c. 15. prohibited the exportation of gold or silver plate, or money, which prohibition was confirmed and enforced by several statutes, in succeeding reigns. The 15 C. 2. c. 7. modified this general restraint, which had been found injurious, and permitted the exportation of all sorts of foreign coin or bullion of gold or silver. This again was restrained by 6 and 7 W. 3. c. 17., and by 7 and 8 W. 3. s. 19. which last prohibited the exportation of any molten silver or bullion whatsoever in any form, unless upon due proof made in the manner therein described before the court of the lord mayor, and aldermen of London, that the same was foreign bullion, and never had been coin of the realm, or clippings thereof, nor plate wrought within the kingdom. But these and all other statutes to the same effect were repealed by the 59 G. 3. c. 49. and the gold and silver coin of this realm, and also the bullion produced by melting it, but not the clippings, or bullion produced by melting the clippings of the coin, may now be manufactured or exported, or otherwise disposed of,

2. Felonies, against the king's *council*, are these. First, by statute 3 Hen. VII. c. 14. if any sworn servant of the king's household conspires or confederates to kill any lord of this
[101] realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is made felony without benefit of clergy.

3. Felonies in *serving foreign states*, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4. which makes it felony for any person whatever to go out of the realm, to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also [by the same statute] for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without

See Vol. I. pag. 232.

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of, without restraint or penalty; so that, in effect, this class of offences is now expunged from the criminal law.

Another curious offence connected with this subject, but now also extinct, was the "art or craft of multiplying gold or silver." By the 5 H. 4. c. 4. it was enacted that none from henceforth shall use to multiply gold or silver, or use the craft of multiplication, and if any the same do, he shall incur the pain of felony. The petition of the commons on which this act passed, as cited by Lord Hale, 1 H. P. C. 644., states the reason to be not a belief in the reality of the art, but that "many men by colour of this multiplication make false money, to the great deceit of the king, and damage of his people." H. 6. however was more credulous; in the 35th year of his reign, he granted a patent to John Faceby and others, *ad investigandum, prosequendum et perficiendum quandam preciosissimam medicinam quintam essentiam, lapidem philosophorum nuncupatum, necnon potestatem faciendi et exercendi transmutationes metallorum in verum aurum et argentum* with a *non obstante* of the stat. of H. 4. In Easter term, 7 E. 6. Dyer, 87. b. is a case of a man's confessing himself guilty of multiplication, and of using *red wine* and other things necessary for the art. The restraint, however, says Mr. S. Hawkins, P. C. B. 1. c. 18. s. 15. having been found to have no other effect upon the unaccountable vanity of those who fancied such attempts to be practicable, but only to send them beyond sea, to try their experiments with impunity in other countries, the stat. 5 H. 4. was at last wholly repealed by 1 W. & M. c. 30.

previously entering into a bond with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And further by statute 9 Geo. II. c. 30. enforced by statute 29 Geo. II. c. 17. if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without licence under the king's sign manual, he shall be guilty of felony without benefit of clergy: but if the person, so enlisted or enticed, shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. By statute 29 Geo. II. c. 17. it is moreover enacted, that to serve under the French king, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500*l.* (6)

4. FELONY by *imbezzling* or *destroying* the king's *armour* or warlike *stores*, is, in the first place, so declared to be by statute 31 Eliz. c. 4. which enacts, that if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for

(6) Both these last statutes are now repealed by the 59 G. 3. c. 69. which provides in the most comprehensive terms against the offences mentioned above. By this statute it is made a misdemesnour punishable by fine or imprisonment, or both, for any natural born subject of his majesty, without licence under the sign manual, or signified by order in council, or by proclamation, to enter or agree to enter into the service, or under or in aid of any foreign prince or people, or person exercising or assuming to exercise the powers of government in any foreign state, province, or part thereof, as an officer, soldier, sailor, or in any warlike capacity whatsoever; or even to go abroad with that intent; or for any person whatever in any part of his majesty's dominions even to attempt to enlist any person for any of these purposes. The sixth section imposes a forfeit of 50*l.* on the master of any ship for every such person whom he shall knowingly take on board, and on the owner for every such person whom he shall knowingly even agree to take on board. The ship to be detained till the penalty be paid, or bail found for the payment. The seventh and eighth sections provide against the equipment, or arming wholly or partially of any ship, with intent to employ her as a ship of war, transport, or storeship, in the service of any foreign state, or persons exercising any powers of government.

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victualling the king's soldiers or mariners, shall, either for gain, or to impede his majesty's service, imbezzle the same
[102] to the value of twenty shillings, such offence shall be felony. And the statute 22 Car. II. c. 5. takes away the benefit of clergy from this offence, and from stealing the king's naval stores to the value of twenty shillings; with a power for the judge, after sentence, to transport the offender for seven years. Other inferior imbezzlements and misdemesnors, that fall under this denomination, are punished by statutes 9 & 10 W. III. c. 41. 1 Geo. I. st. 2. c. 25. 9 Geo. I. c. 8. and 17 Geo. II. c. 40., with fine, corporal punishment, and imprisonment. And by statute 12 Geo. III. c. 24. to set on fire, burn, or destroy any of his majesty's ships of war, whether built, building, or repairing; or any of the king's arsenals, magazines, dock-yards, rope-yards, or victualling offices, or materials thereunto belonging; or military, naval, or victualing stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in, such offence; shall be felony without benefit of clergy. (7)

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(7) The 25 G. 3. c. 56., the 33 G. 3. c. 2., the 39 & 40 G. 3. c. 89., the 52 G. 3. c. 12., the 54 G. 3. c. 60., the 55 G. 3. c. 127., and perhaps other statutes, have been passed respecting the embezzlement, importation, and exportation of military and marine stores; but it is in vain to attempt in a note an analysis of their minute provisions. Some of these statutes, but more particularly the 39 & 40 G. 3. c. 89. provide against the unlawful receiving, or having possession of stores so embezzled or stolen. With regard to the first class of offences, it should be observed, that the statutes are not intended to interfere with felonies at common law, but to provide for those cases, in which the party has such a possession of the goods before he embezzles them, that in so doing he commits only a breach of trust, and not a larceny. This is a distinction which will be considered more fully hereafter (see post, p. 231.); it will be enough to say now, by way of illustration, that though the statute of C. 2. speaks only of embezzling to the value of 20*s*., yet where an officer has but a bare charge of taking care of the stores in the king's warehouses, or a mere authority to order them to be delivered to the workmen authorised to receive them, he will be guilty of felony at common law in stealing them, though the amount be under 20*s*.; exactly as the butler who steals his master's plate, or the shepherd his master's sheep, where they have but the charge, and the master still retains the possession. 2 East. P. C. c. xvi. s. 53.

With regard to the second class of offences, it is to be observed, that certain marks specified in the statutes called the king's marks, denote the original ownership in the king, and when that and the possession in the party are proved, the statutes throw on him the burthen of proving the

5. DESERTION from the king's armies in time of war, whether by land or sea, in England or in parts beyond the sea, is by the standing laws of the land (exclusive of the annual acts of parliament to punish mutiny and desertion), and particularly by statute 18 Hen. VI. c. 19. and 5 Eliz. c. 5., made felony, but not without benefit of clergy. But by the statute 2 & 3 Edw. VI. c. 2. clergy is taken away from such deserters, and the offence is made triable by the justices of every shire. The same statutes punish other inferior military offences, with fines, imprisonment, and other penalties. (8)

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legality of such possession. A possession strictly speaking can only be legal, where it was derived originally by purchase from certain officers authorised to sell king's stores, who ought to grant certificates of the sale to the purchasers. But the presumption which arises against the prisoner from the non-production of this certificate, is liable to be rebutted by circumstances, showing that in fact the possession was an honest one.

It has been usual of late in the annual mutiny act, to provide that the offence of embezzling the public stores, when committed by officers, paymasters, commissaries, or persons employed in that or similar departments, may be tried by a general court martial; and the court is empowered to transport, fine, imprison, dismiss from the service, or pronounce incapable of further service, civil or military.

(8) The 37 G. 3. c. 70. (continued by several acts, and made perpetual by 57 G. 3. c. 7.) makes it a felony without benefit of clergy for any one maliciously and advisedly to endeavour to seduce any soldier or sailor, or marine, from his allegiance, or to stir him up to mutiny, or to endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice.

nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been defeated or converted to better purposes, by the vigour of our free constitution, and the wisdom of successive parliaments.

The antient British church, by whomsoever planted, was a stranger to the bishop of Rome, and all his pretended authority. But the pagan Saxon invaders, having driven the professors of Christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in these kingdoms, till the æra of the Norman conquest; when the then reigning pontiff having favoured duke William in his projected invasion, by blessing his host and consecrating his banners, took that opportunity also of establishing his spiritual encroachments: and was even permitted so to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates; prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in rivetting the chains of a free-born people. (1)

(1) Whatever was the extent of William's submission to the papal power, it was regulated entirely by his own convenience. His haughty and fearless nature was favoured by the circumstance of a divided papacy, and he carried his independence of Rome farther than most of his successors before the Reformation. He would not permit any pontiff to be acknowledged in his dominions without his previous approbation; and he examined all letters from the court of Rome, on their arrival, before their publication was permitted. Upon a demand made by Gregory VII. for the arrears of Peter's pence, he consented to it, as a payment commonly made through Europe, and which had been submitted to by his predecessors; but he positively refused to accede to a demand, made at the same time, that he should do homage for his crown. William's preference of Norman prelates seems to be misunderstood by the author; it is admitted, on all hands, that the Saxon clergy had degenerated to a disgraceful state of ignorance and sensuality, and that his appointments were in general creditable to himself, and highly useful to the cause of religion: it is also clear that the Norman prelates partook of the general freedom of their countrymen, and were not "bred in the doctrine or practice of slavery."—See Turner's and Lingard's Histories.

THE most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan; with this difference, however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually, therefore, to enslave the consciences and minds of the people, the Romish clergy themselves paid [106] the most implicit obedience to their own superiors or prelates; and they, in their turns, were as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible, and his authority co-extensive with the Christian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulls and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were enforced by anathemas and spiritual censures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exercise of Christian ordinances, and the benefits of the gospel of God.

BUT, though the being spiritual head of the church was a thing of great sound, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore it's attention began very early to be rivetted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offences were created, and indulgences were sold to the wealthy, for liberty to sin without danger. The canon law took cognizance of crimes, injoined penance *pro salute animae*, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom

was gradually drained by a thousand channels, into the coffers of the holy see.

The establishment also of the feodal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the Church; which began first in Italy, and gradually spread itself to England. The pope became a
[107] feodal lord; and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feodal tenure, being originally gratuitous donations, were at that time denominated *beneficia*; their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice*. Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture, by institution from the bishop, and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vasal by his superior; and the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vasals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

At length the holy father went a step beyond any example of either emperor or feodal lord. He reserved to himself, by his own apostolical authority [d], the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again; and moreover such also as became

[d] *Extrav. l.* 3 *t.* 2. *c.* 13.

vacant by his promotion to a bishoprick or abbey: "*etiamsi* "*ad illa personae consuevcrint et debuerint per electionem aut* "*quemvis alium modum assumi.*" And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feodal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of *commendams* (2): and papal *provisions* were the previous nomination to such benefices, by a kind of anticipation, before they became actually void: though afterwards indiscriminately [108] applied to any right of patronage exerted or usurped by the pope. In consequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and averse to the laws and constitution of England. The very nomination to bishopricks, that antient prerogative of the crown, was wrested from king Henry the first (3), and after-

(2) *Commendam* is, properly, the commending or committing a benefice to the charge of some clerk, until it may be conveniently provided with a pastor. This definition seems to imply a vacancy of the benefice; but *commendams*, whether temporary or permanent, are ordinarily divided into two classes, those which are granted *retinere*, and those which are granted *capere*; the former prevent, and the latter supply a vacancy. Thus promotion to a bishoprick avoids all former promotions after consecration, but not before; if a dispensation of that avoidance is granted before consecration, it is *retinere*; if it comes afterwards, it is *capere*, or *recipere*. Hobart therefore denies the first to be a commendam at all; "my own benefice (says he), cannot be commended to me;" and before consecration it remains the grantee's own. But, however, the effects of the two are different; the first only preventing a vacancy, the incumbency continues in the same state in which it was before the promotion; the latter finds the church vacant, and does not fill it, the commendatory is more in the nature of a guardian or administrator, than an incumbent, and cannot use all the writs, or do all the acts which an incumbent can.

Whatever ecclesiastical authority was in itself lawful to be exercised, though the exercise of it by the pope was an usurpation, became revested in the king at the reformation; it is he, therefore, who by mandate to the archbishop of Canterbury, under the 25 H. 8. c. 21. now grants commendams. But the reformation did not give him the illegal power of the pope, and therefore the consent of the patron to a commendam is in all cases necessary. Burn. Ecc. Law, ii. p. 1. Hobart. 140. 3 Lev. 377.

(3) This is shortly expressed; the point in dispute was not so much the nomination to bishopricks, as the right of investiture by the ring and crosier. Lay fiefs having been annexed to bishopricks, kings contended that the feudal rights and duties followed as a matter of course, of which none was more important than that a tenant should not be admitted to a fief without his lord's consent, and should perform fealty and homage on

wards from his successor king John; and seemingly indeed conferred on the chapters belonging to each see; but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the pope. And, to sum up this head with a transaction most unparalleled and astonishing in it's kind, pope Innocent III. had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vasal of the holy see, at the annual rent of a thousand marks. (4)

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admission. On the other hand, the popes contended that the ring and crosier were the emblems of spiritual jurisdiction, with which laymen had no right to interfere. Henry yielded the ring and crosier, but insisted that bishops should do fealty and homage before a grant of the temporalties, which was conceded. It might seem that the church gained substantially little by this compromise; and so Dr. Lingard asserts; but, in truth, the advantage gained was very important, for before the grant of the ring and crosier, the new bishop's consecration could not be complete; and, therefore, the power of withholding it operated as a veto in an early stage of the election; whereas when the vacancy was actually filled up, it became a more difficult and less gracious thing to refuse the temporalties.

With regard to the right of nomination, which the author calls "that antient prerogative of the crown," however antient a prerogative, and antient it undoubtedly was, it was itself, nevertheless, an infringement of the original constitution of the church, according to which bishopricks were filled by the election of the clergy and laity of the respective dioceses. But the diocesan clergy had first excluded the laity, and then had been themselves excluded by the cathedral, and in some instances conventual, chapters; and when bishopricks became endowed with large temporal possessions and power, it seemed but a necessary consequence that the crown should have a controul over the manner of filling them. Long usage had legalized, what reason had first introduced. See Lingard, Hist. ii. 169. Hallam, Midd. Ages. cap. 7.

(4) The dispute between John and Innocent III. was owing to the exercise of another power assumed by the papal court; that of not merely deciding cases of contested elections, but of filling up the place vacated by the irregularity of the election or unfitness of the elected. The monks of Christ Church at Canterbury, without asking the royal licence, or waiting for the concurrence of the provincial bishops, had elected Reginald their sub-prior archbishop; then a part of them, with the usual licence and concurrence, elected John de Gray, bishop of Notwich. Innocent decided that the right of election was in the monks, but that their choice was informal;

ANOTHER engine set on foot, or at least greatly improved, by the court of Rome, was a master-piece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and it's concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the conquest, and endowed, not [109] only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

I MIGHT here have enlarged upon other contrivances, which will occur to the recollection of the reader, set on foot by the court of Rome, for effecting an entire exemption of it's clergy from any intercourse with the civil magistrate; such as the separation of the ecclesiastical court from the temporal; the appointment of it's judges by merely spiritual

formal; and that the bishop of Norwich's election was void, because made before Reginald's had been formally annulled; and thereupon he appointed Stephen Langton, an English clergyman at Rome. John refused to recognise him, upon which his kingdom was first interdicted, and after four years he himself deposed. See Lingard (Hist. iii. 22—42.), who enters into some curious reasoning, and states some curious facts to establish that the surrender of John was not so disgraceful an act as it has been commonly considered.

authority without any interposition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But the history and progress of ecclesiastical courts [e], as well as of purchases in mortmain [f], have already been fully discussed in the preceding volumes: and we shall have an opportunity of examining at large the nature of the *privilegium clericale* in the progress of the present book. And therefore I shall only observe at present, that notwithstanding this plan of pontifical power was so deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men, who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm, (which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments,) unconnected with their fellow-subjects, and totally indifferent what might befal that posterity to which they bore no endearing relation: — yet it vanished into nothing, when the eyes of the people were a
[110] little enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under; and to affect an entire independence of that civil state, which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus, in some degree, endeavoured to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of *praemunire*, which were framed to encounter this overgrown yet increasing evil. King Edward I., a wise and magnanimous prince, set himself in earnest to shake off this servile yoke [g]. He would not suffer his bishops to attend a general council, till they had

[e] See Vol. III. pag. 61. [f] See Vol. II. pag. 268 Dav. 83., &c.

sworn not to receive the papal benediction. He made light of all papal bulles and processes: attacking Scotland in defiance of one: and seizing the temporalties of his clergy, who under pretence of another refused to pay a tax imposed by parliament. (5) He strengthened the statutes of mortmain; thereby closing the great gulph, in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bulle of excommunication against another, he ordered him to be executed as a traitor, according to the antient law [h]. (6) And in the thirty-fifth year of his reign was made the first statute against papal provisions, being, according to sir Edward Coke [i], the foundation of all the subsequent statutes of *praemunire*, which we rank as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

In the weak reign of Edward the second the pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulles of the see of Rome. But Edward the third was of a temper extremely different: and to remedy these inconveniences first by gentle means, he and his nobility wrote an [111] expostulation to the pope; but receiving a menacing and contemptuous answer, withal acquainting him, that the emperor, (who a few years before at the diet of Nuremberg, *A. D.* 1323, had established a law against provisions [k],) and

[h] Bro. *Abr. tit. Corone.* 115. *Treason,* 14. 5 Rep. p. 1. fol. 12. 30 Ass. 19.

[i] 2 Inst. 583.

[k] Mod. Un. Hist. xxix. 293.

(5) At this time the clergy taxed themselves; it was not, therefore, for refusing to pay a tax imposed by parliament, in which they would have been fully justified, but for procuring a bulle, by which the clergy of all Christian countries were forbidden to grant to laymen the revenues of their benefices, without leave of the holy see, and under the protection of it refusing the king a fifth, that he issued a proclamation of outlawry against them, and took possession of all their lay fees, goods, and chattels. Lingard, Hist. iii. 340.

(6) But because that lawe had not of long time beene put in execution, the chancellor and treasurer kneeled before the king, and obtained grace for him, so as he was onely banished out of the realme. Davis, 95. and the *placita* referred to in Brooke.

also the king of France, had lately submitted to the holy see; the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors[l], which enact severally, that the court of Rome shall not present or collate to any bishoprick or living in England; and that whoever disturbs any patron in the presentation to a living by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision; and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and pope Urban V. attempted to revive the vasalage and annual rent to which king John had subjected his kingdom, it was unanimously agreed by all the estates of the realm in parliament assembled, 40 Edw. III., that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope should endeavour by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power[m].

In the reign of Richard the second, it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Ric. II. c. 3. and 7 Ric. II. c. 12. first, that no alien should be capable of letting his benefice to farm; in order to compel such as had crept in, at least to reside on their preferments: and, afterwards, that no alien should be
[112] capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefices made void. To which the statute 13 Ric. II. st. 2. c. 2. adds banishment and forfeiture of lands and goods: and by c. 3. of the same statute, any person bringing over any citation or excommunication from beyond sea,

[l] Stat. 25 Edw. III. st. 6. 27 Edw. III. st. 1. c. 1. 38 Edw. III. st. 1. c. 4. and st. 2. c. 1, 2, 3, 4.

[m] Seld. *in Fleta*. 10. 4.

on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

In the writ for the execution of all these statutes the words *praemunire facias*, being (as we said) used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *praemunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *praemunire*. It is the statute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulles, instruments, or other things, which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council: or process of *praemunire facias* shall be made out against them as in other cases of provisors. (7)

By the statute 2 Hen. IV. c. 3. all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *praemunire*. And this is the last of our antient statutes touching this offence; the usurped civil power of the

(7) In the parliament in which this statute was drawn up, the king upon the petition of the commons, had inquired of the estates of the realm, what they would do, if the pope were to excommunicate bishops for instituting the king's presentees, where they had obtained judgment in the king's courts against the appointees of the pope; or should attempt to translate them from their present sees to other sees out of the kingdom (a mode then in use for getting rid of an obnoxious bishop). The answer of the lords and commons was in substance that they would stand by the king, to live and die, against proceedings such as these, which would be subversive of the rights of the crown. The prelates agreed in their condemnation of such acts, and their determination to resist them, but declared that they did not intend to deny the pope's general right of excommunication and translation. Upon these answers the statute was framed; Doctor Lingard doubts whether it was ever formally passed, but it was always acted on, and has been legislatively recognised as a valid statute in many instances. Lingard's Hist. iv. 310.

bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised
[113] against foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no farther attempts were afterwards made in support of these foreign jurisdictions.

A LEARNED writer, before referred to, is therefore greatly mistaken, when he says [n], that in Henry the sixth's time the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute 16 Ric. II., might be repealed; but that this motion was rejected. This account is incorrect in all it's branches. For, first, the application, which he probably means, was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, 18 Hen. VI., that very synod which at the same time refused to confirm and allow a papal bulle, which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II. in particular; but to request that the penalties thereof, which by a forced construction were applied to all that sued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only; those who appealed to Rome, or to any foreign jurisdiction: the tenor of the petition being, "that those penalties should "be taken to extend only to those that commenced any suits "or procured any writs or public instruments at Rome or "elsewhere out of England; and that no one should be pro-"secuted upon that statute for any suit in the spiritual courts "or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion [o].

[114] AND indeed so far was the archbishop, who presided in this synod, from countenancing the usurped power of the

[n] Dav. 96. [o] Wilk. *Concil. Mag. Brit.* iii. 533.

pope in this realm, that he was ever a firm opposer of it. And, particularly in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of it's being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. (8) For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, "and also to quit himself to God and the church of this "land, of which God and the king had made him governor.' This was not the language of a prelate addicted to the slavery of the see of Rome; but of one who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, 17 Hen. VI., he refused to consecrate a bishop of Ely, that was nominated by pope Eugenius IV. A conduct quite consonant to his former behaviour, in 6 Hen. VI., when he refused to obey the commands of pope Martin V., who had required him to exert his endeavours to repeal the statute of *praemunire* ("*execrabile illud statutum*," as the holy father phrases it); which refusal so far exasperated the court of Rome against him, that at length the pope issued a bulle to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merits, that the lords spiritual and temporal, and also the university of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king, to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome [p].

[p] See Wilk. *Concil. Mag. Br.* Vol. III. *passim*, and Dr. Duck's life of archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All Souls college in Oxford: in vindication of whose memory the author hopes to be excused this digression; if indeed it be a digression to shew how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were, which the statutes of *praemunire* and provisors were made to restrain.

(8) This prelate (Henry Beaufort, the Bishop of Winchester,) became cardinal in the reign of his great-nephew Henry the Sixth; but he was compelled to promise, that he would do no act in the execution of his office which might derogate from the rights of the crown, or of the subject; and a protest was made in the king's name against the entry of any legate into the kingdom, except on the king's petition. — Lingard, v. 145.

This then is the original meaning of the offence, which we call *praemunire;* viz. introducing a foreign power into this land, and creating *imperium in imperio,* by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of *praemunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the several statutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19. & 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to sue to Rome for any licence or dispensation; or to obey any process from thence; are made liable to the pains of *praemunire.* And, in order to restore to the king in effect the nomination of vacant bishopricks, and yet keep up the established forms, it is enacted by statute 25 Hen. VIII. c. 20. that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *praemunire.* Also by statute 5 Eliz. c. 1. to refuse the oath of supremacy will incur the pains of *praemunire;* and to defend the pope's jurisdiction in this realm, is a *praemunire* for the first offence, and high treason for the second. So, too, by statute 13 Eliz. c. 2. if any one import any *agnus Dei,* crosses, beads, or other superstitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or receive the same with such intent, and not discover the offender; or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counsellor; they all incur *praemunire.* But importing or selling mass-books, or other popish books, is by statute 3 Jac. I. c. 5. § 25. only liable to a penalty of forty shillings. Lastly, to contribute to the maintenance of a jesuit's college, or any popish seminary whatever, beyond sea; or any person in the same; or to contribute to the maintenance of any jesuit or popish priest in England, is by statute 27 Eliz. c. 2. made liable to the penalties of *praemunire.*

[116] Thus far the penalties of *praemunire* seem to have kept within the proper bounds of their original institution, the de-

pressing the power of the pope: but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more, and some less, relation to this original offence, and some no relation at all.

THUS, 1. By the statute 1 & 2 Ph. & Mar. c. 8. to molest the possessors of abbey lands granted by parliament to Henry the eighth, and Edward the sixth, is a *praemunire*. 2. So likewise is the offence of acting as a broker or agent in any usurious contract, when above ten *per cent.* interest is taken, by statute 13 Eliz. c. 8. (9) 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *praemunire*, by statute 21 Jac. I. c. 3. 4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *praemunire* by two statutes: the one 16 Car. I. c. 21. the other 1 Jac. II. c. 8. 5. On the abolition, by statute 12 Car. II. c. 24. of purveyance [q], and the prerogative of pre-emption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *praemunire*. (10) 6. To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *praemunire* by statute 13 Car. II. c. 1. 7. By the *habeas corpus* act also, 31 Car. II. c. 2. it is a *praemunire*, and incapable of the king's pardon, besides other heavy penalties [r], to send any

[q] See Vol. I. pag. 287. [r] See Vol. I. pag. 138. Vol. III. pag. 137.

(9) Several statutes (see Vol. II. p. 463.) have reduced the legal rate of interest; but none seems to have repealed this clause of the statute of Elizabeth.

(10) This is a mistake. By the statute, any person exercising purveyance for the future is to be imprisoned by the justices near, and proceeded against by indictment at the next sessions; and the party grieved may, besides, bring a civil action, and recover treble damages and treble costs: but the penalties of *præmunire* are inflicted only as in the case of monopolies just before mentioned, where a party, after notice that the action is grounded on the statute, obtains any stay of proceedings or execution, other than by authority of the court, arrest of judgment, or writ of error.

subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. & M. st. 1. c. 8. persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *praemunire*; and by statute
[117] 7 & 8 W. III. c. 24. serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and subscribed the declaration against popery, are guilty of a *praemunire*, whether the oath be tendered or no. (11) 9. By the statute 6 Ann. c. 7. to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking is a *praemunire*: as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann. c. 23. if the assembly of peers in Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *praemunire*. 11. The statute 6 Geo. I. c. 18. (enacted in the year after the infamous south-sea project had beggared half the nation) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the names of bubbles, subject to the penalties of a *praemunire*. 12. The statute 12 Geo. III. c. 11. subjects to the penalties of the statute of *praemunire* all such as knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of king George II. as are by that act prohibited to contract matrimony without the consent of the crown[s].

Having thus inquired into the nature and several species of *praemunire*, it's punishment may be gathered from the foregoing statutes, which are thus shortly summed up by sir Edward Coke[t]: "that from the conviction, the defendant

[s] See Book I. ch. 4. [t] 1 Inst. 129.

(11) See ante, p. 58. (6)

"shall be out of the king's protection, and his lands and "tenements, goods and chattels, forfeited to the king: and "that his body shall remain in prison *at the king's pleasure*: "or (as other authorities have it) *during life*[u]:" both which [118] amount to the same thing; as the king by his prerogative may any time remit the whole, or any part, of the punishment, except in the case of transgressing the statute of *habeas corpus*. (12) These forfeitures here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, sir Edward Coke adds, was this offence of *praemunire*, that a man that was attainted of the same might have been slain by any other man without danger of law: because it was provided by law[w], that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions[x], (13) the statute 5 Eliz. c. 1. provides, that it shall not be lawful to kill any person attainted in a *praemunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding. But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever, being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief[y].

[u] 1 Bulst. 199.
[w] Stat. 25 Ed. III. st. 5. c. 22.
[x] Bro. *Abr. t. Corone.* 197.
[y] 1 Hawk. P.C. c. 19. s. 47.

(12) It seems hardly to amount to the same thing; — in the one case, the term of imprisonment would be at the discretion of the court, *voluntas Domini Regis in curiâ*; in the other, the court would have no discretion, but must pronounce the sentence of imprisonment for life, and the party would be left for any remission of it to the royal mercy, (*voluntas Domini Regis in camerâ.*) See post, p. 121.

(13) There was more ground for this notion than is implied in the text, for the statute referred to in the margin, which is one of those against provisors, expressly enacts, that he who offends "against such provisors in body, goods or other possessions, shall be excused before all men, and for such offence shall never be grieved, or let at the suit of any one."

CHAPTER THE NINTH.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE KING AND GOVERNMENT.

THE fourth species of offences, more immediately against the king and government, are entitled misprisions and contempts.

Misprisions (a term derived from the old French, *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever; and that if the king so please, the offender may be proceeded against for the misprision only [a]. And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemesnor: as happened in the case of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Essex's rebellion [b]. Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

[120] I. Of the first, or negative kind, is what is called *misprision of treason*; consisting in the bare knowledge and concealment

[a] Yearb. 2 *Ric. III.* 10. Staundf. P.C. 37. Kel. 71. 1 Hal. P.C. 374. 1 Hawk. P.C. c.20.

[b] Hudson of the court of star-chamber. *MS. in Mus. Brit.* (1)

(1) This has been since published in the Collectanea Juridica. vol. ii. pp. 1—241. See post, p. 268.

of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence and in other states of Italy [c]. But it is now enacted by the statute 1 & 2 Ph. & M. c.10. that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal, if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace [d]. But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing before-hand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason [e].

THERE is also one positive misprision of treason, created so by act of parliament. The statute 13 Eliz. c.2. (2) enacts, that those who forge foreign coin [of gold or silver], not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprision of treason. For, though the law would not put foreign coin upon quite the same footing as our own; yet, if the circumstances of trade concur, the falsifying it may be attended with consequences almost equally pernicious to the public; as the counterfeiting of Portugal money would be at present; and therefore the law has made it an offence just below capital, and that is all. For the

[c] Guicciard. Hist. b. 3. & 13.
[d] 1 Hal. P. C. 372.
[e] 1 Hawk. P. C. c. 20. s. 3.

(2) This ought to be 14 Eliz. c.3., and the author has been led into the mistake by implicitly copying Hawkins; but the 13 Eliz. c. 2. did also create a positive misprision of treason in the concealing the offer of a bulle, or instrument of reconciliation to the see of Rome, for six weeks after the offer made; and the 23 Eliz. c. 1. made the offence of aiding and maintaining those who had been guilty of the treasons constituted by that act, liable only to the penalties of misprision of treason. By the word *aiders* in this act, 14 Eliz. c.3., Lord Hale says, are intended aiders of the fact, not aiders of the person, as receivers and comforters. 1 H. P. C. 376.

punishment of misprision of treason is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life[f]. Which total forfeiture of the goods was originally in-
[121] flicted while the offence amounted to principal treason, and of course included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter[g], that wherever an offence is punished by such total forfeiture, it is felony at the common law.

Misprision *of felony* is also the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute Westm. 1. 3 Edw. I. c. 9., is imprisonment for a year and a day; in a common person, imprisonment for a less, discretionary time; and, in both, fine and ransom at the king's pleasure: which pleasure of the king must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; "*voluntas regis in curia, non in camera*[h]." (3)

There is also another species of negative misprisions: namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly punishable by death[i]; (4) but now only by fine and imprisonment[j].

II. Misprisions, which are merely positive, are generally denominated *contempts* or *high misdemesnors*; of which

[f] 1 Hal. P. C. 374.
[g] See pag. 94.
[h] 1 Hal. P. C. 375.
[i] Glan. l. 1. c. 2.
[j] 3 Inst. 133.

(3) The words in the statute, applicable to a common person, are *le Roy prendra a eux grevement*, which Lord Coke explains, "at the king's suit they shall be fined grievously and imprisoned." But the statute with regard to common persons punishes only the "not suing and arresting felons at the summons of the sheriff, and cry of the county;" and seems hardly to apply to misprision of felony in them, as defined in the text. If the officer be unable to pay the fine, he shall be imprisoned three years. 2 Inst. 171.

(4) It is not clear, from the passage in Glanville, whether the punishment was death, or loss of member.

1. The first and principal is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the offence of *imbezzling the public money*, called among the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person [k]. With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. Other misprisions are, in general, such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are [122]

2. Contempts against the king's *prerogative*. As, by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service for defence of the realm, against a rebellion or invasion [l]. Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel [m]. Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of such extrinsic power; as, by taking a pension from any foreign prince without the consent of the king [n]. Or, by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas, (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished,) or by his writ of *ne exeat regnum* (5), or proclamation, commanding the

[k] *Inst.* 4. 18. 9.
[l] 1 Hawk. P. C. c. 22. s. 2.
[m] Lamb. Eir. 233.
[n] 3 Inst. 144.

(5) See Vol. I. p. 266.

subject to stay at home Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned: for then it is punishable, like the rest of
[123] these contempts, by fine and imprisonment, at the discretion of the king's courts of justice [p].

3. Contempts and misprisions against the king's *person* and *government*, may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die: these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory or other infamous corporal punishment [q]: (6) in like manner, as in the antient German empire, such persons as endeavoured to sow sedition, and disturb the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I. and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank [r].

4. Contempts against the king's *title*, not amounting to treason or *praemunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen [s] that it amounts to a *praemunire*. This heedless species of contempt is, however, punished by

[o] See Vol. I. pag. 266.
[p] 1 Hawk. P. C. c. 22. s. 5.
[q] *Ibid.* c. 23.
[r] Mod. Un. Hist. xxix. 28. 119.
[s] See pag. 91.

(6) By the 56 G. 3. c. 138., the punishment of the pillory is abolished, except in cases of perjury, or subornation of perjury, and wilful, false, and corrupt affirmation or subornation thereof, amounting to perjury; and fine or imprisonment, or both substituted for it. This punishment, however, has since (perhaps through inadvertency) been inflicted by the 57 G. 3. c. 12. (see ante, p. 102.), and, I believe, is repeated in the annual mutiny acts.

our law with fine and imprisonment. Likewise if any person shall in any wise hold, affirm, or maintain, that the common law of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemesnor, by statute 13 Eliz. c.1. and punishable with forfeiture of goods and chattels. (7) A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government; and yet acting in a public office, place of trust, or other capacity, for [124] which the said oaths are required to be taken; *viz.* those of allegiance, supremacy, and abjuration; which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by statute 1 Geo. I. st. 2. c.13. are very little, if any thing, short of those of a *praemunire:* being an incapacity to hold the said offices, or any other: to prosecute any suit: to be guardian or executor: to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same. Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college-register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon, and tender the oaths to, any person whom they shall suspect to be disaffected: and every person refusing the same, who is properly called a non-juror, shall be adjudged a popish recusant convict, and subjected to the same penalties that were mentioned in a former chapter[t]; which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon. (8)

5. CONTEMPTS against the king's *palaces* or *courts of justice* have been always looked upon as high misprisions: and by

See pag. 55.

(7) This statute was made for the queen's life, and has expired.

(8) But see pp. 58, 59. nn. (6) (7).

the antient law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death [v]. So, too, in the old Gothic constitution, there were many places privileged by law, *quibus major reverentia et securitas debetur, ut templa et judicia, quae sancta habebantur, — arces et aula regis, — denique locus quilibet praesente aut adventante rege* [u]. [125] And at present, with us, by the statute 33 Hen. VIII. c. 12. malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length.

But *striking* in the king's superior courts of justice, in Westminster-hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be, that those courts being antiently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more; *viz.* the disturbance of public justice. For this reason, by the antient common law before the conquest [w], striking in the king's courts of justice, or drawing a sword therein, was a capital felony: and our modern law retains so much of the antient severity as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life [x]. A *rescue* also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life [y]: being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason, an affray, or riot, near the

[v] 3 Inst. 140. *LL. Alured. cap.* 7. & 34.
[u] Stiernh. *de jure Goth. l.* 3. *c.* 3.
[w] *LL. Inae. c.* 6. *LL. Canut.* 56. *LL. Alured. c.* 7.
[x] Staund. P. C. 38. 3 Inst. 140, 141.
[y] 1 Hawk. P. C. c. 21. s. 5.

said courts, but out of their actual view, is punished only with fine and imprisonment

NOT only such as are guilty of an actual violence, but of [126] threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment [a]. (9) And even in the inferior courts of the king, an affray or contemptuous behaviour is punishable with a fine by the judges there sitting; as by the steward in a court-leet, or the like [b].

LIKEWISE all such, as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty [c]: which offences, when they proceeded farther than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods [d].

LASTLY, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute (all of which are impediments of justice); are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And antiently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony: and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision [e], and liable to be fined and imprisoned [f].

[a] Cro. Car. 378.
[a] *Ibid.* 503.
[b] 1 Hawk. P. C. c. 21. s. 10.
[c] 3 Inst. 141, 142.
[d] Stiernh. *de jure Goth. l.* 3. c. 3.
[e] See Bar. 212. 27 Ass. pl. 44. § 4. fol. 138.
[f] 1 Hawk. P. C. c. 21. s. 15.

(9) It has been determined, that a judge sitting at *nisi prius* has the power of fining even a defendant conducting his own defence to a criminal charge, for contempt of the court in the course of that defence. *R.* v. *Davison*, 4 B. & A. 329.

CHAPTER THE TENTH.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our distribution will next lead us to take into consideration such crimes and misdemesnors as more especially affect the *commonwealth*, or public polity of the kingdom: which, however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offences against the king, as the *pater familias* of the nation: to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent presumed from and proved by immemorial usage.

THE species of crimes which we have now before us, is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions, or descriptions of this great variety of offences, and to the punishments inflicted by law for each particular offence; with now and then a few incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail, than is consistent with the plan of these Commentaries.

THE crimes and misdemesnors that more especially affect the commonwealth, may be divided into five species: *viz.* offences against public *justice*, against the public *peace*, against [128] public *trade*, against the public *health*, and against the public *police* or *oeconomy*; of each of which we will take a cursory view in their order.

FIRST, then, of offences against public *justice*: some of which are felonies, whose punishment may extend to death; others only misdemesnors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. EMBEZZLING or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted by statute 8 Hen. VI. c. 12. that if any clerk, or other person, shall wilfully take away, withdraw, or avoid any record, or process in the superior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it shall be felony not only in the principal actors, but also in their procurers and abettors. And this may be tried either in the king's bench or common pleas, by a jury *de medietate*: half officers of any of the superior courts, and the other half common jurors. Likewise by statute 21 Jac. I. c. 26. to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. (1) Which law extends only to proceedings in the courts themselves: but by statute 4 W. & M. c. 4. to personate any other person (as bail) before any judge of assize or other commissioner authorized to take bail in the country, is also felony. For no man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely usurped in courts, or before their public officers.

2. To prevent abuses by the extensive power, which the law is obliged to repose in gaolers, it is enacted by statute

(1) But the attainder does not work any corruption of blood, or forfeiture of dower.

14 Edw. III. c. 10. that if any *gaoler* by too great duress of imprisonment makes any prisoner, that he hath in ward, be-
[129] come an *approver* or an *appellor* against his will: that is, as we shall see hereafter, to accuse and turn evidence against some other person; it is felony in the gaoler. For, as sir Edward Coke observes[a], it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment: and least of all by a gaoler, to whom the prisoner is committed for safe custody.

3. A THIRD offence against public justice is *obstructing* the execution of lawful *process*. This is at all times an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process. And it hath been holden, that the party opposing such arrest becomes thereby *particeps criminis:* that is, an accessory in felony, and a principal in high treason.[b] (2) Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice, (especially in London and Southwark), under the pretext of their having been antient palaces of the crown, or the like[c]: all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 & 9 W. III. c. 27., 9 Geo. I. c. 28., and 11 Geo. I. c. 22., which enact, that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavours to execute his duty therein, so that he receives

[a] 3 Inst. 91.
[b] 2 Hawk. P. C. c. 17. s. 1.
[c] Such as *White-Friers*, and its environs; the *Savoy*; and the *Mint* in Southwark.

(2) It seems that there must be a knowledge of the party's guilt of the particular species of offence, to implicate the person opposing his arrest, as accessary to the crime (see Hawkins in the place cited); though where the party is actually in the custody of an accredited officer, as a constable or sheriff, he that rescues him must at his peril take notice of the crime with which he is charged. It should, however, be understood in all these cases, that where clergy is taken away from the original felony by statute, the person so hindering his arrest shall still have his clergy. 1 Hale P. C. 606. See the 1 & 2 G. 4. c. 88. p. 131. n. (6).

bodily hurt, shall be guilty of felony, and transported for seven years: and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing or for having executed the same, shall be felons without benefit of clergy. (3)

4. An *escape* of a person arrested upon criminal process by eluding the vigilance of his keepers before he is put in hold is also an offence against public justice, and the party himself is punishable by fine or imprisonment.[d] But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, *negligently* permit a felon to escape, are also punishable by fine[e]: but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this whether he were actually committed to gaol, or only under a bare arrest.[f] But the officer cannot be thus punished, till the original delinquent hath actually received judgment or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemesnor[g]. (4) [130]

[d] 2 Hawk. P.C. c. 17. s. 5.
[e] 1 Hal. P.C. 600.
[f] 1 Hal. P. C. 590. 2 Hawk. P.C. c. 19. s. 22.
[g] 1 Hal. P.C. 598, 9. 2 Hawk. P.C. c. 19. s. 26.

(3) The 9 G. 1. c. 28., by which the capital punishment was imposed upon the offence last described, has been repealed in that part by the 1 G. 4. c. 116.

(4) The offence for which the party is in custody must be a capital crime at

5. Breach of prison by the offender himself, when committed for any cause, was felony at the common law[h]: or even conspiring to break it[i]. But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II. st. 2., which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at the common law; and to break prison, (whether it be the county-gaol, the stocks, or other usual place of security,) when lawfully confined upon any other inferior charge, is still punishable as a high misdemesnor by fine and imprisonment. For the statute
[131] which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment[j]. (5)

[h] 1 Hal. P. C. 607. Bract. *l.* 3. *tr.* 2. *c.* 9.

[i] 2 Hawk. P. C. c. 18. s. 21.

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at the time he is suffered to escape, in order to make the voluntary escape capital in the officer. So that if A is in custody for having dangerously wounded B and the officer suffers him to escape; though B should afterwards die, and A thereupon become guilty of murder, yet the escape will not be capital, for A was in custody only for a misdemeanour at the time of the escape. Hawk. P. C. B. 2. c. 19. s. 25. This rule applies also to breaches of prison within the exception of the statute of Ed. 2. Ib. c. 18. s. 14.

The provisions already mentioned in the text, reach cases only where the escape is actually effected; but by the 16 G. 2. c. 31., which is mentioned for another purpose in the following page, it is made a felony punishable by transportation for seven years, to assist any prisoner in attempting to make his escape from the custody of any officer or person having lawful charge of him by virtue of a warrant of commitment for treason or felony (except petty larceny), expressed in such warrant (and therefore a commitment on suspicion is not within the act, 1 Leach, 97, Walder's case); or to assist any felon in attempting to make his escape from any boat or ship carrying felons for transportation, or from the contractor for their transportation, his assigns or agents, or any person to whom such felon shall have been delivered, in order for transportation.

(5) The offence of prison-breach is in law and reason also complete, whether the party was or was not guilty upon the charge for which he was imprisoned; and therefore Hale lays it down that he may be tried and have judgment for it, before trial of the principal felony. At the same time, with more mercy than consistency, he lays down that, if he has been tried for the principal felony and acquitted, he shall not be tried for the prison-breach, or may plead his acquittal in bar. 1 Hale, H. P. C. 611. The practice

6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemesnor, a misdemesnor also. But here likewise as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished: and for the same reason; because perhaps in fact it may turn out that there has been no offence committed [k]. By statute 11 Geo. II. c. 26. and 24 Geo. II. c. 40. if five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. By the statute 16 Geo. II. c. 31. to convey to any prisoner in custody for treason or [any] felony [except petty larceny] any arms, instruments of escape, or disguise, without the knowledge of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years: or if the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt [damages or costs amounting in the whole to] 100*l*., it is then a misdemesnor, punishable with fine and imprisonment. And by several special statutes [l], (6) to rescue, or attempt to rescue,

[k] 1 Hal. P. C. 607. Fost. 344.

[l] 6 Geo. I. c. 23. (Transportation.) 19 Geo. II. c. 34. (Smuggling.) 25 Geo. I. c. 22. (Black-act.) 8 Geo. II. c. 20. (Destroying turnpikes, &c.) 9 Geo. II. c. 37. (Murder.) 27 Geo. II. c. 15. (Black-act.)

practice in consequence, I believe, is to try for the principal felony first, and in case of acquittal, to abandon the prosecution for prison-breach.

(6) Other statutes might be added to those cited in the margin, which will however be more conveniently noticed under the several offences to which they reply. As to those cited, the 6 G. 1. c. 23. will be considered hereafter; the capital punishment for rescuing persons in custody under the greater number of the offences specified in the 9 G. 1. c. 22., and 27 G. 2. c. 15., has been taken away by 4 G. 4. c. 54., and transportation or imprisonment with or without hard labour substituted; the 1 G. 4. c. 115. has repealed the capital part of the 8 G. 2. c. 20, substituting the punishments last mentioned; the 52 G. 3. c. 143. has done the same with the 19 G. 2. c. 34. The 1 & 2 G. 4. c. 88. is a general statute made for the amendment of the law of rescue. It provides, that where any one shall be convicted of felony for the rescue, or assistance in the rescue of any one, and be thereupon entitled

any person committed for the offences enumerated in those acts, is felony without benefit of clergy: and to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offences against the black-act, 9 Geo. I. c. 22. and being required by order of the privy council to surrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet, or succour him, are felons without benefit of clergy.

[132] 7. Another capital offence against public justice is the *returning from transportation*, or being seen at large in Great Britain, before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself. This is made felony without benefit of clergy in all cases, by statutes 4 Geo. I. c. 11. 6 Geo. I. c. 23. 16 Geo. II. c. 15. and 8 Geo. III. c. 15. as is also the assisting them to escape from such as are conveying them to the port of transportation. (7)

8. An eighth is that of *taking a reward*, under pretence of *helping* the owner to his *stolen goods*. This was a contrivance carried to a great length of villainy in the beginning of the

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entitled to clergy, and be liable to one year's imprisonment, the court instead thereof may sentence him to transportation for seven years, or to imprisonment with or without hard labour for any term not less than one nor more than three years. And it provides also, that where any one shall be convicted of a misdemeanour for assaulting any officer or other person, with intent to hinder the lawful apprehension or detainer of any person charged with or suspected of felony, the court may, in addition to any punishment to which such offender is already liable, sentence him to hard labour for any term not exceeding two years, nor less than six months.

(7) So much of all these statutes as relates to the punishment of persons returning from transportation, is repealed by the 5 G. 4. c. 84., a general act on the subject of transportation. By sect. 22. the offence is made capital, and may be tried either in the county or place where the party shall be apprehended, or from which he was ordered to be transported. By the same section, the offence of rescuing, or attempting to rescue, or of conveying disguise, instrument for escape, or arms to any one while in the act of being removed or transported, is made punishable in the same manner as prison-breach. A reward of 20*l.* is to be given for the discovery and conviction of any such offender at large.

reign of George the first: the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all farther inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves who brought in all their spoils to him; and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. I. c. 11. that whoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against them. Wild, still continuing in his old practice, was upon this statute at last convicted and executed [m]. (8)

9. Receiving of stolen goods, *knowing them to be stolen*, is also a high misdemesnor and affront to public justice. We have seen in a former chapter [n], that this offence, which is only a misdemesnor at common law, by the statutes 3 W. & M. c. 9. and 5 Ann. c. 31. makes the offender accessory to the theft and felony. But because the accessory cannot in general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice To remedy which, it is enacted by statute 1 Ann. st. 2. c. 9 and 5 Ann. c. 31. that such receivers may still be prosecuted for a misdemesnor, and punished by fine and imprisonment, though the principal felon be not before taken so as to be [133] prosecuted and convicted. And, in case of receiving stolen lead, iron, and certain other metals, such offence is by statute 29 Geo. II. c. 30. punishable by transportation for fourteen years [o]. So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemesnor immediately, before the thief is taken [p]; or to wait till the

[m] See stat. 6 Geo. I. c. 23. § 9.
[n] See pag. 38.
[o] See also statute 2 Geo. III. c. 28. § 12. for the punishment of receivers of goods stolen by bum-boats, &c. in the Thames.
[p] Foster, 374.

(8) By the 1 G. 4. c. 115., this act, as far as regards the possibility of capital punishment under it, is repealed, and transportation for life, or a term not less than seven years, or imprisonment with or without hard labour for a term not exceeding seven years, is substituted, at the discretion of the court which tries the prisoner.

felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes, that he shall only make use of one, and not both of these methods of punishment. (9) By the same statute also, 29 Geo. II. c. 30., persons having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemesnor, and punishable by fine or imprisonment. And by statute 10 Geo. III. c. 48. all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years. (10)

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(9) The statutes of 3 W. & M. and 5 Anne were attended by the inconvenience mentioned in the text, and also by that of taking away the common-law proceeding against a receiver for a misdemesnor, that offence being merged in the felony. The 1 Anne and sect. 6. of 5 Anne were passed to remedy these inconveniences, and must therefore be construed with reference to them; accordingly Mr. J. Foster lays it down as illegal to prosecute under them for a misdemesnor while the principal is in custody, and amesnable to justice; and that in such a case the prosecutor has no option. This was not inconsistent with the determination in Wilkes's case, 1 Leach, Cr. Ca. 105., where it was held that a receiver might be tried for the misdemesnor, though the principal felon might at one period have been taken by the prosecutor, who neglected to do so, there being no collusion at that time, nor any ability to take him at the time of the prosecution. But the 22 G. 3. c. 58. (which extends to cases as well of petty larceny in the principals, in which there are at common law no accessories, as to grand larcenies, or greater offences,) has altered the law in this respect, and the receiver may now be prosecuted for the misdemesnor, whether the principal be amenable to justice or not. In consequence of this, the unconvicted principal may be brought into court, and is a competent witness against the receiver. Haslam's case, 1 Leach, Cr. Ca. 418.

(10) The policy of the 29 G. 2. c. 30. has been extended by the 21 G. 3. c. 69. to stolen pewter in any form or shape whatever, and the buying or receiving it with guilty knowledge, whether the principal felon has or has not been convicted, is punishable by transportation for a term not exceeding seven years, or imprisonment with hard labour for any term not less than one nor more than three years, with public whippings not exceeding three in number.

The statutes of W. & M. and Anne have been often held not to extend to the receivers of money stolen, upon the principle, that though in a large sense the term "goods and chattels" might well include it, yet the intent of the acts only extended to such goods and chattels, the property in which being

10. Of a nature somewhat similar to the two last is the offence of *theft-bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently [134] called compounding of felony; and formerly was held to make a man an accessory; but is now punished only with fine and imprisonment [q]. This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "*latroni eum si-*" *milem habuit, qui furtum celare vellet, et occulte sine judice* " *compositionem ejus admittere* [r]." By statute 25 Geo. II. c. 36. even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l.* each.

11. Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise [s]. The punishment for this offence, in a common person, is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future [t]. And indeed it is enacted by statute 12 Geo. I. c. 29. that if any one, who hath been convicted of forgery, perjury, subornation of perjury, or common barretry, shall practise as an attorney, solicitor, or agent, in any suit; the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be re-

[q] 1 Hawk. P. C. c. 59. § 6.
[r] Stiernh. *de jure Goth. l.* 3. *c.* 5.
[s] 1 Hawk. P. C. c. 81. § 1.
[t] *Ibid.* § 14.

being in its nature ascertainable by outward marks, made it more difficult for the thief to dispose of them without the aid of a receiver; whereas money has not in general any such distinguishing marks, and it requires no aid from a receiver to give effect to the theft. This principle did not apply so well to the case of bank-notes, and other paper representatives of money; but the same law, though with a difference of opinion on the subject, was extended to them. By the 3 G. 4. c. 24., however, this has been altered, and the 2 G. 2. c. 25. (see post, p. 254.), which makes it felony to steal such instruments, is extended to the receipt of them when stolen; and the offence is in all respects assimilated to the receipt of stolen goods. See 2 East, P. C. 748.

ferred another offence, of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2., to be punished by six months' imprisonment, and treble damages to the party injured.

12. Maintenance is an offence that bears a near relation to the former; being an officious intermeddling in a suit that
[135] no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it[u]: a practice that was greatly encouraged by the first introduction of uses[w]. This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And, therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage[x]. A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment[y]; and by the statute 32 Hen. VIII. c. 9., a forfeiture of ten pounds.

13. Champerty, *campi-partitio*, is a species of maintenance, and punished in the same manner[z]: being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expence[a]. Thus *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our

[u] 1 Hawk. P. C. c. 83. § 9.
[w] Dr. & St. 203.
[x] *Ff.* 48. 10. 28.
[y] 1 Hawk. P. C. c. 83. § 38.
[z] *Ibid.* c. 84. § 1.
[a] Stat. of conspirat. 33 Edw. I.

law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, "*qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur*[b];" and they were punished by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto also must be referred the provision of the [136] statute 32 Hen. VIII. c. 9., that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder: on pain that both purchasor and vendor shall each forfeit the value of such land to the king and the prosecutor. These offences relate chiefly to the commencement of *civil* suits: but

14. THE *compounding of informations* upon penal statutes is an offence of an equivalent nature in *criminal* causes; and is, besides, an additional misdemesnor against public justice, by contributing to make the laws odious to the people. At once, therefore, to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5., that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good,) he shall forfeit 10*l.*, shall stand two hours on the pillory, and shall be for ever disabled to sue on any popular or penal statute. (11)

Ff. 48. 7. 10.

(11) See ante, p. 123. n.

15. A CONSPIRACY also to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice; for which the party injured may either have a civil action by writ of conspiracy, (of which we spoke in the preceding book [c],) or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the antient common law [d] to receive what is called the *villenous* judgment; *viz.* to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their own bodies committed to prison [e]. (12)

[c] See Vol. III. pag. 126. 1 Hawk. P. C. c. 72. § 9.
[d] Bro. *Abr. tit. Conspiracy*, 28.

(12) It does not seem to be necessary that the innocent man should be acquitted, or even indicted, to make the crime of conspiracy complete. He may have been convicted, (if not capitally, for then it might be questionable, whether the offence was not of a more serious nature,) or the indictment may have been quashed for intrinsic defects, without putting him on his trial, or it may have been preferred in a court which has no jurisdiction of the crime charged. Yet as in all these cases there would still have been a confederacy to injure an individual by a false charge to the abuse of public justice, according to authorities as well as in reason, the crime of conspiracy would be complete. So also if the essence of the crime is the guilty act of confederating for unlawful purposes, as I shall try to show it is, then even preferring the indictment, though very important, cannot be necessary evidence to make out the charge. If A and B agree to indict C of a crime, of which they do not believe him to be guilty, the conspiracy is at that moment, according to this supposition, complete, and they might be indicted for it, though their project should be arrested at that point.

This is the only species of conspiracy which the author treats of in this volume, but in its several species it is a very comprehensive head of criminal law. It is not very easy to frame a definition of the crime in accordance with all the decisions on the subject: in some instances, the unlawfulness of the means; in others, the unlawfulness of the end has been held to make the offence: in some again, both the end and the means have been in themselves lawful; but the bare fact of the confederacy has determined it to be conspiracy; while, on the other hand, it is said that there may be a confederacy to do an illegal act by illegal means, and yet the parties not be indictable for a conspirary. Perhaps, upon examination of these four cases, it will be found that the two circumstances of a confederacy, and a purpose criminally unlawful, are essentially necessary, and they alone, to the crime of conspiracy, and that the confusion has arisen from the fallacy of separating the means from the end, or considering that any means could possibly

But it now is the better opinion, that the villenous judgment is by long disuse become obsolete; it not having been pro- [137]

possibly be lawful, of which the end was unlawful; or, on the other hand, any end lawful, the means to which were unlawful. Thus, in the first instance, where unlawful means are used to procure a lawful end, the instance adduced is that of a marriage procured by threat or contrivance: it is said that marriage in itself is a lawful end, and that a confederacy to procure that end would not have been a conspiracy, unless undue means, such as violence, threat, or contrivance, had been used. The answer seems to be that marriage is in itself a neutral term, before we can pronounce it lawful or unlawful as an end, we must add to it the qualification of free and voluntary, or constrained and involuntary, and that a confederacy to procure a marriage of the latter sort, *i.e.* a marriage brought about by the means above specified, is a confederacy for an unlawful purpose. The same explanation will reconcile the third case to the rule; in that it is said that the means and the end may be both lawful, and yet the bare confederacy so to produce the end be a conspiracy; and the instance commonly put has been that of journeymen confederating to raise their wages by refusing to work: here, it is said, an increase of wages is a lawful object, refusing to work is a lawful mean, for each man has a right to value his labour at his own price, and, if he chooses to starve, may be idle. The answer here again is, that before we can pronounce a raising of wages to be lawful or unlawful, we must know how they are to be raised; one raising may be lawful, another unlawful, and the difference consists entirely in the means by which each is effected; then if it depends on the means, the confederacy here is part of the means; refusing to work by one would be ineffectual, all must refuse in order to procure the end desired, and it cannot be supposed that all will refuse, unless there be a previous combination and agreement: thus the confederacy being part of the means, makes them unlawful, and they being inseparable from the end, make the end unlawful; so that this again is a confederacy for an unlawful purpose. In the last case, the difficulty is of a different nature; but when the authority comes to be examined on which it rests (I allude to the case of *R.* v. *Turner*, and others, 13 East, 228.), it will be found not to vary in principle from the rule laid down. Eight men were indicted for conspiring with others to go into a preserve against the will of the owner to destroy the hares there, and to procure bludgeons and other offensive weapons, and to go there armed therewith for the purpose of opposing all who should hinder them in their purpose. They were found guilty, and the judgment was arrested. Lord Ellenborough, whose judgment is alone reported, said, shortly, "I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther; I should be sorry to have it doubted whether persons *agreeing to go and sport upon another's ground*, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." It is clear from this that Lord Ellenborough thought neither the means nor the end, nor the union of both, criminally unlawful; whether he was right in this opinion, or whether his mind was influenced by the natural and laudable

nounced for some ages: but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory. To this head may be referred the offence of sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 Geo. II. c. 24., at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years. (13)

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desire, which his words evince, not to extend the range of a crime which after all is of a very general and uncertain nature, and the punishment of which is often severe, is not the present question; his judgment affirms the rule that there must be a confederacy for an unlawful purpose; and does not establish the proposition that there may be confederacy for an unlawful purpose, and yet no conspiracy. *R.* v. *Mawbey* and others, 6 T. R. 619. *R.* v. *Fowler* and others, East, P. C. c. xi. s. 11. Russell, C. L. 1800. *R.* v. *Gill* and another, 2 B. & A. 204. *R.* v. *De Berenger* and others, 3 M. & S. 72.

Having in the course of this note mentioned the case of combinations of journeymen to raise their wages, I ought to add a notice of the 5 G. 4. c. 95., which, after repealing a great number of statutes on the subject, enacts, that neither masters nor workmen shall be liable to any prosecution or punishment whatever for combining to lower, raise, or fix the rate of wages, to increase, lessen, or alter the hours of working, or quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business; nor any workman for combining to induce another to refuse to enter into service, or depart from it, before the end of the term for which he is hired, or to quit or return his work before it be finished. But if any of the acts specified above on the part of the workmen be done with violence, or threats, or if there be any combination for such last-mentioned purpose, the parties may be proceeded against summarily before two justices, of whom neither may be a master, or the father or son of a master, in any trade or manufacture, and may be punished by imprisonment with or without hard labour for any term not exceeding two calendar months, the conviction of such justices being subject to no appeal.

(13) The provisions of this statute were extended by the 52 G. 3. c. 64. to cases where the letter was sent with an intent to extort any bond, bill of exchange, bank-note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money, or delivery or transfer of goods or other valuable thing.

The offence described in the statute 30 G. 2. c. 24. (which is so far repealed), and in the 52 G. 3. c. 64., is now made punishable both in the principal and accessories before the fact, by transportation for life, or any term not less than seven years, or imprisonment with or without hard labour for any term not exceeding seven years. Under the statute which enacts this, the 4 G. 4. c. 54., this offence is in all respects assimilated to those mentioned at p. 144. under the 9 G. 1. c. 22. and 27 G. 2. c. 15.

16. The next offence against public justice is when the suit is past it's commencement, and come to trial. And that is the crime of wilful and corrupt *perjury*; which is defined by sir Edward Coke[f], to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question. The law (14) takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently *in foro conscientiae* incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be corrupt, (that is, committed *malo animo*,) wilful, positive, and absolute; not upon surprize, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned. *Subornation* of perjury is the offence of procuring another to take such a false oath, as constitutes perjury in the [138] principal. The punishment of perjury and subornation, at common law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony[g]. But the statute 5 Eliz. c. 9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner; and in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprison-

[f] 3 Inst. 164. [g] *Ibid.* 163.

(14) Except where particular statutes specially provide otherwise, which is very common.

ment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law; especially as, to the penalties before inflicted, the statute 2 Geo. II. c. 25. superadds a power, for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period; and makes it felony without benefit of clergy to return or escape within the time. (15) It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation; as it is in all cases by the

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(15) The statute of Elizabeth did not alter the nature of the offence of perjury; but the construction put upon it in a number of cases has so narrowed the application of it, and encumbered the proceeding under it with difficulties, that it is seldom resorted to. The most material of these restrictions are that it applies only to the case of a witness, and not even in that case if the perjury was committed by a witness for the crown; and that it is necessary that some one should have been injured by the perjury; excluding thereby all cases where the false witness was not believed, or by accident swore what was true, though he intended to swear falsely.

One material distinction prevails between the punishment of perjury at the common law and under the statute. The infamy, which incapacitates from giving testimony, is only a consequence of the judgment at common law, and therefore a pardon, which removes the *effect* of the judgment, removes the infamy, and restores the competency. But the statute of Elizabeth expressly provides that the party convicted shall never be received as a witness, until the judgment be *reversed*, and therefore the pardon does not restore the competency.

With regard to the punishment of perjury, it should be observed that the statute 56 G. 3. c. 138., which abolishes the punishment of the pillory in all other cases, expressly preserves it in the case of perjury and subornation of perjury.

One other incident to the conviction of perjury in certain offenders has already been noticed at p. 134.

The 23 G. 2. c. 11. is an important statute as to this crime; it describes in the 1st and 2d sections a short and general form which shall be sufficient in all indictments, and informations for perjury and subornation of perjury, in order to obviate the frequent failures of prosecutions by reason of the long and minute statements heretofore thought necessary. The 3d section authorises the justices of assize, *nisi prius*, or general gaol delivery, as well as the judges in Wales or the counties palatine, to direct the prosecution of any witness for perjury, and gives in such case the party injured counsel without fees, and exempts the whole proceeding from any fees of court.

laws of France [h]. And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be considered, that there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution, therefore, it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown, on whom alone the prisoner's fate depends: so naturally does one cruel law beget another. (16) But corporal and pecu-

[h] Montesq. Sp.L. b. 29. c.11.

(16) The French law is now materially altered in this respect. By the Code Penal, liv. iii. tit. 2. s. 7. § 1., it appears that false testimony in a criminal proceeding is ordinarily punished by hard labour for a term of years, which species of punishment (the "*travaux forcés à temps*") can never be pronounced for less than five or more than twenty years. See liv. i. c. 1. If, however, the person against whom the testimony has been given shall have been condemned to any punishment heavier than that before mentioned, the false witness against him *suffers the same punishment*. The false witness in civil matters, or petty misdemesnors (contraventions, see p. 5. n.), is punished by imprisonment with hard labour ("*reclusion*"), a species of punishment which must be pronounced for five years at the least, and ten at the most (see liv. i. c. 1.), unless he has received money or any other recompence or promise of it; in which cases the punishment is hard labour for a term of years, with forfeiture of the money or other recompence. Subornation of perjury is punished always on a scale of severity graduated by and exceeding, where it is possible, that of the false witness himself; if his punishment be "*reclusion*," the suborner's will be the "*travaux forcés à temps*;" if the false witness suffer this last, or transportation, the suborner will be condemned to it *à perpétuité*; and if the false witness suffer hard labour for life, or capitally, the punishment of his suborner is death.

These punishments far exceed in severity those of the English law; the *travaux forcés* are directed to be of the severest kind; the convicts work at them with a heavy weight at their feet, or chained two and two where the nature of the work will permit of it. It suspends all the civil abilities of the convict for the time, he can receive no portion of his income, and no payment of rent or debts is valid to him; farther it imposes on him, in many respects, perpetual civil infamy; he cannot be a juror, is admitted only as a witness for certain purposes, cannot act as guardian, or serve in the armies of the king. The same punishment for life, or that of transportation, bring with them civil death; the convict, too, is publicly branded on the right shoulder. Whether the sentence to the *travaux forcés* be for life or years, the convict before entering on them must stand for an hour in the "*carcan*," a species of pillory, with an inscription over his head, stating, in large characters, his name, occupation, place of abode, punishment, and crime. Liv. i. c. 1.

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niary punishments, exile and perpetual infamy, are more suited to the genius of the English law; where the fact is openly discussed between witnesses on *both* sides, and the evidence for the crown may be contradicted and disproved
[139] by those of the prisoner. Where indeed the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment: which our antient law in fact inflicted [i]. But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should; much less that this crime should in *all* judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted; and therefore it seems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law; which has adopted the opinion of Cicero [k], derived from the law of the twelve tables, "*perjurii poena divina, exitium; humana,* "*dedecus.*" (17)

17. Bribery is the next species of offences against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office [l]. In the east it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate

[i] Britton. c. 5. [k] *De. Leg.* 2. 9. [l] 1 Hawk. P. C. c. 67.

It should be observed, too, that the circumstances which the author notices as accounting for the difference between the punishments inflicted by the two laws no longer exist. Witnesses are heard for the defence, and no rack is used to extort a confession, except, indeed, the moral torture of repeated and ingenious examinations in private and in public.

(17) See post, 196.

or other public assembly, as for the bartering of common justice, yet, by a strange indulgence in one instance, it tacitly encouraged this practice; allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year [m]: not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic [n], orders those who take presents for doing their duty to be [140] punished in the severest manner: And by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe [o]. In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same [p]. But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the chief justice Thorpe was hanged for it in the reign of Edward III. (18) By a statute [q] 11 Hen. IV. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice.

18. EMBRACERY is an attempt to influence a jury corruptly to one side by promises, persuasions, [threats,] entreaties, money, entertainments, and the like [r]. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value. (19)

[m] *Ff.* 48. 11. 6.
[n] *De Leg. l.* 12.
[o] Pott. Antiq. b. 1. c. 23.
[p] 3 Inst. 147.
[q] *Ibid.* 146.
[r] 1 Hawk. P. C. c. 85. § 1.

(18) Lord Coke (3 Inst. 145.) denies that Thorpe was hanged, or could be hanged, for this offence, though he was certainly condemned to be hanged; and he cites the Parliament Rolls, 10 R. 2. 24., to shew that he was then pardoned and restored to all his lands.

(19) It is criminal even to instruct a jury beforehand in the merits of the cause: they are to be influenced only by the strength of evidence, and the arguments of counsel in open court at the trial of the cause.

19. THE *false verdict* of jurors, whether occasioned by embracery or not, was antiently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned [s].

20. ANOTHER offence of the same species is the *negligence of public officers*, entrusted with the administration of justice, as sheriffs, coroners, constables, and the like, which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one [t]. Also the omitting to apprehend persons offering stolen
[141] iron, lead, and other metals to sale, is a misdemesnor, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30. (20)

21. THERE is yet another offence against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyrannical partiality of judges, justices, and other *magistrates*, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders,) it is sure to be severely punished with forfeiture of their offices, (either consequential or immediate,) fines, imprisonment, or other

[s] See Vol. III. p. 402, 403. [t] 1 Hawk. P.C. c. 66. § 2.

(20) By the 22 G. 3. c. 58. s. 4., the spirit of this clause is extended to all stolen goods; it enacts, that every person to whom any stolen goods shall be offered for sale, or custody, or in pawn, shall, upon reasonable cause to suspect that they were stolen, apprehend the party, and carry him before a justice of the peace. It was probably intended by this statute to enable any individual to arrest a person who offered goods for sale under suspicious circumstances, and this would have been an enlargement of the common law; but by inserting the word "stolen" before "goods," it is questionable whether it is not made a condition precedent that a felony should have been committed as to the goods by some one. If so, the clause is almost nugatory, because by the common law, where a felony has been committed, he that suspects, upon reasonable grounds, A to be that felon, will be justified in apprehending him, though, in fact, A should be innocent. Hale, II. P. C. 2. 78.

discretionary censure, regulated by the nature and aggravations of the offence committed. (21)

22. LASTLY, *extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due [u]. The punishment is fine and imprisonment, and sometimes a forfeiture of the office.

[u] 1 Hawk. P.C. c. 68. § 1.

(21) See post, 259. and Vol. I. p. 354. In order to provide for the due punishment of all malversations in office by governors and magistrates in the subordinate members of the empire, who could not at common law be tried in this country where their offences had not been committed, and for whose trial there may be often no competent tribunal in the province itself, the 42 G. 3. c. 85. has provided that all offences committed by any person employed abroad in the service of his majesty in any public station civil or military, may be prosecuted in the K. B. in England, the offence to be laid as if committed in Middlesex; and, besides the punishment which the party would have suffered for the same crime in England, he is made liable, at the discretion of the court of K. B., to be adjudged incapable of ever serving his majesty again. Other sections provide for the mode of procuring evidence from abroad. And the last section provides, that where the party injured by such offender proceeds against him civilly for damages, he may lay the fact to have been committed in Westminster, or in any county where the defendant shall then reside.

CHAPTER THE ELEVENTH.

OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to consider offences against the public *peace*; the conservation of which is intrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large[a]. These offences are either such as are an actual breach of the peace; or constructively so, by tending to make others break it. Both of these species are also either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes: and, particularly,

1. THE *riotous assembling* of *twelve* persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 & 4 Edw. VI. c. 5., when the king was a minor, and a change in religion to be effected: but that statute was repealed by statute 1 Mar. c. 1., among the other treasons created since the 25 Edw. III.; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2. c. 12., which made the same offence a single felony. These statutes specified and particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of

[a] Vol. I. p 118. 268. 350.

Mary made felony, but within the benefit of clergy; and also the act indemnified the peace officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was likely to produce great discontents: but at first it [143] was made only for a year, and was afterwards continued for that queen's life. And, by statute 1 Eliz. c. 16., when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the first to the death of queen Anne, it was never once thought expedient to revive it: but, in the first year of George the first, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. st. 2. c. 5. enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation *ought to have been made*, and knowing of such hinderance, and not dispersing, are felons without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; being copied from the act of queen Mary. And, by a subsequent clause of the new act, if any persons, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy. (1)

(1) By the 8th section of the statute, no person is to be prosecuted for offences committed contrary to it, except within twelve months after the commission. The 6th section of the act makes provision for the recovery

2. By statute 1 Hen. VII. c. 7. *unlawful hunting* in any legal forest, park, or warren, not being the king's property, *by night*, or with *painted faces*, was declared to be single felony. But now by the statute 9 Geo. I. c. 22., to appear armed in any inclosed forest or place where deer are usually kept, or in any warren for hares or conies, or in any high
[144] road, open heath, common, or down, by day or night, with faces blacked or otherwise *disguised*, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish, or to procure by gift or promise of reward any person to join them in such unlawful act, is felony without benefit of clergy. I mention these offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed; namely, with the face blacked or with other disguise, and, being armed with offensive weapons, to the breach of the public peace, and the terror of his majesty's subjects. (2)

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of damages done to any church, &c. by action against the hundred, or the inhabitants of a city if a county of itself. This provision was a necessary consequence of the former parts of the act, which by turning a mere trespass into a felony, of course deprived the party injured of any civil redress for the injury done to his property against those who had injured it; and therefore the action against the hundred is substituted for it. No action can therefore be maintained under this statute, unless a felony has been committed; unless the parties beginning to demolish or demolishing can be brought within the former clauses, the civil remedy subsists against *them*, and the hundred is not liable. In a case under this act (*Lord King* v. *Chambers*, 4 Campb. 377.), it was held that no beginning to demolish was within the act, unless there was an intention to demolish actually; and the jury were directed to find for the defendant, in a case where a mob after doing partial mischief retired voluntarily, if they believed that their original intention was to injure only and not demolish. The 57 G. 3. c. 19. § 38. has therefore extended the remedy to every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or in any manner damaged or injured, or where any fixtures thereto attached, or any furniture, goods, or commodities whatever, which shall be therein, shall be "destroyed, taken away, or damaged by the acts of any riotous or tumultuous assembly of persons, or by the act of any person engaged in, or making part of, any such assembly." See the case of *Pinkney* v. *the Inhabitants of East Hundred*, 2 Saund. 374. ed. 1824.

(2) This part of the 9 G. 1., the black act, is now repealed by the 4 G. 4. c. 54., and the punishment of transportation for seven years, or imprisonment with or without hard labour for any term not exceeding three years, substituted for that of death.

3. Also by the same statute 9 Geo. I. c. 22., amended by statute 27 Geo. II. c. 15., knowingly to send any *letter* without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threateniug* (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. This offence was formerly high treason by the statute 8 Hen. VI. c. 6. (3)

4. To pull down or destroy any *lock*, *sluice*, or *floodgate*, erected by authority of parliament on a navigable river, is by statute 1 Geo. II. st. 2. c. 19. made felony, punishable with transportation for seven years. By the statute 8 Geo. II. c. 20. the offence of destroying such works, or rescuing any person in custody for the same, is made felony without benefit of clergy; and it may be enquired of and tried in any adjacent county, as if the fact had been therein committed. (4) By the statute 4 Geo. III. c. 12. maliciously to damage or destroy any banks, sluices, or other works on such navigable river, to open the floodgates or otherwise obstruct the navigation, is again made felony, punishable with transportation for seven years. And by the statute 7 Geo. III. c. 40. (which repeals all former acts relating to turnpikes,) maliciously to pull down or otherwise destroy any *turnpike-gate* or fence, toll-house, or weighing-engine thereunto belonging, erected by authority of [145] parliament, or to rescue any person in custody for the same, is made felony without benefit of clergy; and the indictment

(3) See p. 137. n. (13). These acts were not repealed by the 30 G. 2. c. 24., though that was a subsequent statute, made upon the same general subject matter, and imposing a lighter punishment; for many important distinctions were taken upon the wording of the statutes. See 2 East, P. C. c. xxiii. s. 3. But all these are now as to these offences repealed by the 4 G. 4. c. 54., which, whether the letter or writing be with or without a name, or with a fictitious one, but sent or delivered for any of the purposes mentioned in the text, punishes the offence in the manner stated at p. 137. n. (13).

(4) These statutes were suffered to expire; but, after several temporary revivals, were made perpetual by the 27 G. 2. c. 16. The capital part of the 8 G. 2. c. 20. s. 1. stands, however, now repealed by the 1 G. 4. c. 115., and the punishment of transportation for life, or any term of years not less than seven, or imprisonment with or without hard labour for any term not exceeding seven, substituted for it.

may be inquired of and tried in any adjacent county. (5) The remaining offences against the public peace are merely misdemesnors, and no felonies; as,

5. Affrays (from *affraier*, to terrify,) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the fighting be in private, it is no *affray* but an *assault* [b]. (6) Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue [c]. (7) But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace [d]. (8) The punish-

[b] 1 Hawk. P.C. c. 63. § 1.
[c] *Ibid.* § 11.
[d] 1 Hawk. P.C. c. 63. § 13, 14.

(5) This statute was repealed by the 15 G. 3. c. 84., which has been itself repealed by the 3 G. 4. c. 126. By the 128th section of this last act, the offences mentioned in the text are made felony, punishable by transportation for seven years, or, in mitigation thereof, such other punishment as the court may direct, as in cases of petty larceny. But I do not find in this last act the same provision for the trial of the offence in any county.

(6) It seems certain, that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people. Hawkins, P. C. b. i. c. 63. § 4.

(7) A person so interposing "is in the discharge of a duty which the law requireth of him. The law is his warrant, and he may not improperly be considered as a person engaged in the public service, and for the advancement of justice, though not specially appointed to it; and upon that account he is under the same protection as the ordinary ministers of justice are." But then in order to entitle himself to it, he must "undoubtedly give express notice of his friendly intent." Foster, 309. 311.

(8) This must be understood of an affray about to commence, or actually going on, for the constable has no authority to punish for an affray committed and ended; still it seems that he may carry before a justice those who have been arrested by such as were present at an affray, and delivered by them into his hands. Hawkins, P. C. b. i. c. 63. § 17. A justice of the peace has all the power which an individual or a constable has in the suppression of an affray; and where it has passed out of his presence, he may besides issue his warrant to bring the offenders before him, in order to compel them to find sureties of the peace. Ibid. § 18.

ment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued [e]. Another aggravation is, when thereby the officers of [146] justice are disturbed in the due execution of their office: or where a respect to the particular place ought to restrain and regulate men's behaviour, more than in common ones; as in the king's court, and the like. And upon the same account also all affrays in a church or church-yard are esteemed very heinous offences, as being indignities to Him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5&6 Edw.VI. c.4. that if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiae;* and, if a clerk in orders, from the ministration of his office during pleasure. And, if any person in such church or church-yard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto;* or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall, besides excommunication, (being convicted by a jury,) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. (9) *Two* persons may be guilty of an affray: but,

[e] 1 Hawk. P.C. c.63. § 21.

(9) This statute was made to repress the disturbances that in the early ages of the reformation were too apt to arise between the professors of different religions. It has since been applied further to repress quarrels and offences violating the sacred character of churches and church-yards. *Cox* v. *Good-day*, 2 Haggard's R. 139. In this case the charge against a clergyman was for addressing a public reproof to a parishioner during his sermon, without any just cause or provocation, and with great warmth and passion, and with a loud voice. Lord Stowell held that this amounted to brawling; and observed in passing sentence, that "the duty of maintaining order and decorum lies *immediately* upon the churchwardens; the officiating minister has other duties to perform, those of performing divine service.

6. Riots, *routs*, and *unlawful assemblies*, must have *three* persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it[f]. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way; and make some advances towards it[g]. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel[h]: as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nusance, in a violent and tumultuous manner. The pu-
[147] nishment of unlawful assemblies, if to the number of twelve, we have just now seen, may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes superadded[i]. And by the statute 13 Hen. IV. c. 7. any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen, and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable[j]. So that our antient law, pre-

[f] 3 Inst. 176.
[g] Bro. *Abr. t. Riot*, 4, 5.
[h] 3 Inst. 176.
[i] 1 Hawk. P.C. c. 65. § 12.
[j] 1 Hal. P.C. 495. 1 Hawk. P.C. c. 65. § 20.

In saying this, I do not mean to say that occasions may not occur in which it may not be justifiable, and even unavoidable, for him to take a part in suppressing any disorder or interruption in the church." Ibid. 141.

vious to the modern riot-act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all inclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king. (10)

7. NEARLY related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1. c. 5. it is enacted, that not more than twenty names shall be signed to any petition to the king or either house of parliament, for any alteration of matters established by law in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter-sessions; and, in London, by the lord mayor, aldermen, and common council [k], and that no petition shall be delivered by a company of more than ten persons; on pain in either case of incurring a penalty not exceeding 100*l.* and three months' imprisonment. (11) [148]

[k] This may be one reason (among others) why the corporation of London has, since the restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

(10) It is to be understood also, that at common law every sheriff, undersheriff, and also every other peace officer, as constables, &c., may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons whatsoever to assist them therein. Also, it is certain that any private person may lawfully endeavour to appease all such disturbances, by staying those whom he shall see engaged therein from executing their purpose, and also by stopping others whom he shall see coming to join them; for if private persons may do thus much, as it is most certain that they may, towards the suppressing of a common affray, surely *à fortiori* they may do it towards the suppressing of a riot. 1 Hawk. P. C. c. 65. § 11.

(11) In the trial of Lord George Gordon, it was contended that the article of the bill of rights, which declares that it is the right of the subject to petition the king, and that all commitments and prosecutions for such petitioning are illegal, had virtually repealed this statute. This, however, was denied by Lord Mansfield in the name of the court. Douglas. 592.

8. An eighth offence against the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances; which were explained more at large in a former volume[l]. But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim[m]. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Ric. II. st. 1. c. 8. all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II. c. 2., 8 Hen. VI. c. 9., 31 Eliz. c. 11., and 21 Jac. I. c. 15., upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon such conviction may commit the offender to gaol, till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of: and, if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavour to maintain possession by force, where they
[149] themselves or their ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding[n].

[l] See Vol. III. pag. 174, &c.

[m] 1 Hawk. P.C. c. 64. § 2.

[n] Holding over by force, where the tenant's title was under a lease, now expired, is said to be a forcible detainer. (Cro. Jac. 199.)

9. THE offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3., upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner, as by the laws of Solon, every Athenian was finable who walked about the city in armour [o].

10. SPREADING *false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law [p] with fine and imprisonment; which is confirmed by statutes Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. st. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and *pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are therefore punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the antient Gauls [q]. Such false and pretended prophecies were punished capitally by statute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the statute 5 Eliz. c. 15. the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life. (12)

12. BESIDES actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of [150]

[o] Pott. Antiq. b. 1. c. 26.

[p] 2 Inst. 226. 3 Inst. 198.

[q] "*Habent legibus sanctum, si quis quid de republica a finitimis rumore ac fama acceperit, uti ad magistratum deferat, neve cum alio communicet: quod saepe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli, et de summis rebus consilium capere, cognitum est.* Caes. de bell. Gall. lib. 6. cap. 19.

(12) It is not very important to mention, except for the character of the legislature in the time of Edward the Sixth; but I believe the statute which made the felony was the 33 Hen. 8. c. 14., which was altered by the temporary acts of 5 & 4 Ed. 6. c. 15. and 7 E. 6. c. 11.; these having expired, the 5 Eliz. c. 15. was passed; but the punishments inflicted by the statutes of Edward and Elizabeth were the same.

the same denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence [r]. If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender by statute 9 Ann. c. 14. shall forfeit all his goods to the crown, and suffer two years imprisonment. (13)

13. Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule [s]. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law [t]: and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace [u]. For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false [v]; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate it's guilt, and enhance it's punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous [w]; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for
[151] himself, whatever offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation

[r] 1 Hawk. P.C. c.63. § 3, 21.
[s] *Ibid.* c.73. § 1,2.
[t] Moor. 813.
[u] 2 Brown. 151. 12 Rep.35. Hob. 62.215. Poph.139. 1 Hawk. P.C. c.73. § 11.
[v] Moor.627. 5 Rep.125. 11 Mod.99.
[w] See Vol. III. pag.125.

(13) It is indictable also to endeavour to provoke another to send a challenge, being an attempt to procure another to commit a misdemesnor. *R.* v. *Phillips*, 6 East, 464.

may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers. And, therefore, in such prosecutions, the only points to be inquired into are, first, the making or publishing of the book or writing; and, secondly, whether the matter be criminal: and, if both these points are against the defendant, the offence against the public is complete. The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in it's discretion shall inflict; regarding the quantity of the offence, and the quality of the offender[x]. (14) By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Augustus, the punishment became corporal only[y]. Under the emperor Valentinian[z] it was again made capital, not only to write, but to publish, or even to omit destroying them. Our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were established in the dark and tyrannical ages of the antient *decemviri*, or the later emperors.

[x] 1 Hawk. P.C. c. 73. § 21.

——— *Quinetiam lex*
Poenaque lata, malo quae nollet carmine quenquam
Describi: ——— *vertere modum formidine* fustis. HOR. *ad Aug.* 152.

[y] *Cod.* 9. 36.

(14) By the 60 G. 3. and 1 G. 4. c. 8., for the more effectual prevention and punishment of blasphemous and seditious libels, it is enacted, that where the libel tends to bring into hatred and contempt the person of his majesty or the regent, or the government and constitution of the united kingdom as by law established, or either house of parliament, or to excite his majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, the judge on conviction, or the court on judgment by default, may order the seizure of all copies of the libel in the possession of the defendant, or of any person for his use, named in the order; the copies so seized are to be returned free of all expence, if the judgment be arrested or reversed, otherwise to be disposed of according to the direction of the court.

And if any person having been legally convicted of the composition, publication, &c. of *such* a libel, shall be a second time convicted of the same offence, he may be *banished* from the united kingdom, and all other parts of his majesty's dominions, for such term of years as the court shall order.

In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.
[152] Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution [a], is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall

[a] The art of printing, soon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coërcion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privileges and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I., after their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell. I. 44. 134. ii. 88. 280.) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33., which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24., but though frequent attempts were made by the government to revive it, in the subsequent part of the reign, (Com. Journ. 11 Feb. 1694, 26 Nov. 1695, 22 Oct. 1696, 9 Feb. 1697, 31 Jan. 1698,) yet the parliament resisted it so strongly that it finally expired, and the press became properly free, in 1694; and has ever since so continued. (15)

(15) It was in consequence of the ordinance passed in 1643, that Milton published his Areopagitica, or speech for the liberty of unlicensed printing, one of the most moderate yet most eloquent and able of his political works, and one of the most splendid compositions in the language.

on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend [153] them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary to prevent the "daily abuse of it," will entirely lose it's force, when it is shewn (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the controul of an inspector. So true it will be found, that to censure the licentiousness, is to maintain the liberty of the press. (16)

(16) The offence of libel often involves such important considerations, that the public attention is very naturally drawn to the proceedings of courts of justice in the trial of it; at the same time it has something so peculiar in its nature, that it is equally natural to find difficulties in making them satisfactory or intelligible in all respects to ordinary minds. One of the most disputed points on the subject, early in the last reign, was the extent of the province of the jury. The general practice had been for a long series of years, to consider the criminality of a paper charged to be a libel, as a question of pure law, which the judge was to lay down to the jury; and it was contended that this was the most favourable course for the defendant, because the question of criminality must then be either on the record, or in the direction of the judge, and of course always subject to reconsideration for the defendant by writ of error, or on motion for a new trial. In fact, however, it was attended with this heavy disadvantage to him, that wherever the publication and the meaning of the paper as charged, were found against him, he was almost uniformly convicted in the first instance, for the very reason that such conviction was so reviewable. I think this fact, and the reason for it, may both be inferred from the answer of the judges to the third question put by the lords in 1792, in the course of the debates on Mr. Fox's Libel Bill. The question is, "Supposing the publication clearly proved, and the innocence of the paper *as clearly manifest*, is it competent for the judge to recommend a verdict

verdict of Not guilty?" The answer is in the affirmative; "but (they add) no case has occurred in which it would have been in sound discretion fit for a judge, sitting at *nisi prius*, to have given such direction or recommendation to a jury." And the course of argument, which follows, is, that even in apparently the clearest cases the judge may be wrong, and therefore the safe course for him is that which leaves his direction open to review. It is obvious that this was full of practical hardship to the defendant, and that it was a declining from that proper responsibility in the judge, which the public has a right to expect, and without which trials at *nisi prius* in general would lose half their value.

In 1771, after the trial of Mr. Almon, for the republication of Junius, a bill drawn by Mr. Burke, was brought into parliament to settle this important point. It was, however, thrown out; and it is singular enough that Mr. Fox was in the majority; because in 1791, he himself brought in a bill almost in terms the same, which was finally passed in 1792, and is commonly known by his name. It is both declaratory and enacting; by sect. 1. the jury in all cases of information or indictment for libel may find a general verdict of guilty or not guilty, upon the whole matter in issue, and are not to be required by the court or judge to find a verdict of guilty merely on proof of the publication, and the sense ascribed to the paper in the information or indictment. The second and third sections, provide that the court or judge, according to their or his discretion, shall give their or his opinion and directions to the jury on the matter in issue; and that the jury may, if they please, still find a special verdict, as in other criminal cases. The fourth section provides that the defendant may still move in arrest of judgment, if convicted, as before the passing of the act 32 G. 3. c. 60.

The bill passed without much difference of opinion in the commons; in the lords there was more opposition; and Lords Thurlow and Kenyon among others, signed a protest against it, as "subverting a fundamental and important principle of English jurisprudence." But in the arguments on both sides there was no dispute as to the constitutional province of the jury, as to fact distinct from law: the opponents asserted that the criminality of a paper was matter of law, and, that granted, their conclusion followed of course. The advocates of the bill denied the second proposition, and said that the criminality was a question of fact and law inseparably united, and then contended that the first proposition did not apply to any case in which the fact and the law could not be separated; and that in all such cases the jury, though they might receive advice from the court, were by the constitution the sole judges.

One remark more seems proper to be made: the advocates of the bill both in and out of parliament (and no one more powerfully than its real author, the late lord Erskine), uniformly contended that it was to prevent and not to produce an anomaly in the criminal law, and that their sole object was to give the jury the same power, and no other, in a trial for libel, as in a trial for murder. This should be always borne in mind, and so long as it is, the bill will be productive of great benefit; but the object of the bill is very easily misrepresented, for the bill itself rests upon a somewhat subtle proposition; and it is not to be wondered at, if

juries

juries have been sometimes persuaded that in cases of libel they were invested with new and extraordinary powers, while, in the words of John Lilburn, the judge was reduced to a mere cypher. Wherever this happens, the bill is indirectly the source of much mischief.

See the Ann. Reg. v. 33. c.vii. v. 34. pt. 2. p. 69. Parliamentary History, v. 29. pp. 551. 591. 726. 741. But the question cannot be fully understood without reference to all the proceedings in the trial of the dean of St. Asaph.

SECRET LIBRARY.

CHAPTER THE TWELFTH.

OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES against public *trade*, like those of the preceding classes, are either felonious, or not felonious. Of the first sort are,

1. OWLING, so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law [a], and more particularly by statute 11 Edw. III. c.1. when the importance of our woollen manufacture was first attended to; and there are now many later statutes relating to this offence, the most useful and principal of which are those enacted in the reign of queen Elizabeth, and since. The statute 8 Eliz. c. 3. makes the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods, and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offence is felony. The statutes 12 Car. II. c.32. and 7 & 8 W. III. c.28. make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy; and confiscation of goods, and three years' imprisonment to the master and all the mariners. And the statute 4 Geo. I. c.11. (amended and farther enforced by 12 Geo. II. c.21. and

[a] Mir. c. 1. § 3.

19 Geo. II. c. 34.) makes it transportation for seven years, if the penalties be not paid. (1)

2. SMUGGLING, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offence generally connected and carried on [155] hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seisure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices: but the last of them, 19 Geo. II. c. 34., is for this pupose *instar omnium*; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy: enacting, that if three or more persons shall assemble, with fire-arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seisure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons without the benefit of clergy. As to that branch of the statute, which required any person, charged upon oath as a smuggler, under pain of death, to surrender himself upon

(1) These and several other statutes on the same subject were repealed by the 28 G. 3. c. 38., which has itself in several points been altered and partly repealed by subsequent statutes. By it the exportation of live sheep, the breed of Great Britain or the adjacent islands, other than wethers shipped for food, is punishable by forfeiture of the animals and the vessel carrying them, for the benefit of the seizer; besides which, the exporter, his aiders, abettors, procurers, and comforters shall forfeit 3*l.* for every sheep, &c., and suffer solitary imprisonment for three months, and further until the fine be paid, so as the whole imprisonment does not exceed twelve calendar months. For every subsequent offence, the forfeiture is 5*l.* for each sheep, and a like imprisonment for six calendar months, and until such forfeiture be paid; but the imprisonment for non-payment of the penalty must not exceed two years; the penalty to go to him who shall sue for it. The exportation of wool by the same statute is, for the first time, punished by a forfeiture of 3*s.* for every pound of wool, or 50*l.* in the whole, at the election of him who sues, with solitary imprisonment for three calendar months; for the second time, by the same pecuniary penalties, and a six months' imprisonment, with similar restrictions as to the length of the imprisonment for non-payment of the penalties, as before mentioned.

proclamation, it seems to be expired; as the subsequent statutes [b], which continue the original act to the present time, do in terms continue only so much of the said act as relates to the *punishment* of the offenders, and not to the extraordinary method of apprehending or causing them to surrender: and for offences of this positive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot surely be too cautious in inflicting the penalty of death [c]. (2)

[156] 3. Another offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former

[b] Stat. 26 Geo. II. c. 32. 32 Geo. II. c. 18. 4 Geo. III. c. 12.

[c] See Vol. I. pag. 317. Beccar. c. 31.

(2) It is impossible within the limits of a note to give any thing approaching to an intelligible abstract of the various punishments which are awarded under various statutes to different offences against the laws of excise and customs. In a great number of instances, severe penalties follow upon summary conviction; of these it is proper to say, that their necessity can alone justify them, and that upon this principle these convictions are watched with much jealousy by the controuling power of the king's bench. With respect to the cases of capital punishments enumerated in the text, and the doubt therein expressed, the 19 G. 3. c. 69. expressly declared and enacted, that all the orders and directions relative to the surrender, proclaiming, &c. of offenders were continued, and re-enacted by the several acts of continuance, and might be lawfully exercised and used accordingly. However, the important statute now to be regarded on this subject is the 52 G. 3. c. 143., which brings within benefit of clergy all the capital offences against the revenue laws, except those which it afterwards enumerates. These may be divided into two classes; the first includes the minor offences of assisting in illegal exportation, running, relanding, rescuing, &c., but these, in order to be capitally punished, must have been committed by three or more persons armed with fire-arms, or other offensive weapons; the second includes the offence of any person maliciously shooting at or upon any vessel or boat of his majesty's navy, or in the service of the customs or excise within certain specified limits, or within the same limits maliciously shooting at, maiming, or dangerously wounding any officer of his majesty's military or naval forces, or of the customs or excise, or any person aiding him in the due execution of his duty under any revenue act, or act for the prevention of smuggling. This clause comprehends aiders and abettors. The provisions respecting the surrender upon proclamation of persons charged upon oath with any of these offences are similar to those mentioned in the text.

volume [d]; I shall therefore now barely mention the several species of fraud taken notice of by the statute law; *viz.* the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several statutes; his concealing or embezzling his effects to the value of 20*l.*; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy [e]. (3) And indeed it is allowed by such as are the most averse to the infliction of capital punishment, that the offence of fraudulent bankruptcy, being an atrocious species of the *crimen falsi*, ought to be put upon a level with those of forgery and falsifying the coin [f]. And, even without actual fraud, if the bankrupt cannot make it appear that he is disabled from paying his debts by some casual loss, he shall by the statute 21 Jac. I. c. 19. be set on the pillory for two hours, with one of his ears nailed to the same, and cut off. To this head we may also subjoin, that by statute 32 Geo. II. c. 28. it is felony, punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100*l.*, neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors. (4) And these are the only felonious offences against public trade; the residue being mere misdemesnors; as,

4. USURY, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase.

[d] See Vol. II. pag. 481, 482.
[e] Stat. 5 Geo. II. c. 30.
[f] Beccar. ch. 32.

(3) The 5 G. 2. c. 30., and all the other bankrupt laws, stand repealed from the 1st day of May, 1825, by the 5 G. 4. c. 98. (see Vol. II. c. 31.) By the 108th section of this act, it is made a felony liable to the punishment of transportation for life, or any term of years not less than seven, or of imprisonment with or without hard labour for any term not exceeding seven years, for a bankrupt not to surrender in due time and after due notice, to refuse to be examined by the commissioners, not to discover or deliver up all his real and personal estate, the manner of disposal of it, or the books, &c. relating thereto; or to remove or embezzle any part thereof to the value of 10*l.*, or any books, &c. relating thereto, with intent to defraud his creditors.

(4) See Vol. III. p. 416. n. 7. This sum of 100*l.* is, by 33 G. 3. c. 5. (made perpetual by 39 G. 3. c. 50.) extended to 300*l.*

Of this also, we had occasion to discourse at large in a former volume [g]. We there observed that by statute 37 Hen. VIII. c. 9. the rate of interest was fixed at 10*l. per cent. per annum*, which the statute 13 Eliz. c. 8. confirms: and ordains that all brokers shall be guilty of a *praemunire* that transact any contracts for more, and the securities themselves shall be
[157] void. The statute 21 Jac. I. c. 17. reduced interest to eight *per cent.*; and, it having been lowered in 1650, during the usurpation, to six *per cent.* (5), the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13.; and lastly, the statute 12 Ann. st. 2. c. 16. has reduced it to five *per cent.* Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed. Also, if any scrivener or broker takes more than five shillings *per cent.* procuration-money, or more than twelvepence for making a bond, he shall forfeit 20*l.* with costs, and shall suffer imprisonment for half a year. And by statute 17 Geo. III. c. 26. to take more than ten shillings *per cent.* for procuring any money to be advanced on any life-annuity, is made an indictable misdemesnor, and punishable with fine and imprisonment: as is also the offence of procuring or soliciting any infant to grant any life-annuity; or to promise, or otherwise engage, to ratify it when he comes of age. (6)

5. Cheating is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assise* of bread,

[g] See Vol. II. pag 455, &c.

(5) The reduction took place in 1651. See Scobell, 174. The preamble of the ordinance attributes the necessity of it to the decreased value of land and merchandize, and the general want of money felt by the landed and trading interest.

(6) This statute was repealed by the 53 G. 3. c. 141.; but the repealing statute contains clauses in the same terms with those abstracted in the text.

or the rules laid down by the law, and particularly by the statutes 31 Geo. II. c. 29. 3 Geo. III. c. 11. and 13 Geo. III. c. 62. for ascertaining it's price in every given quantity, is reducible to this head of cheating (7): as is likewise in a peculiar manner the offence of selling by *false weights and measures;* the standard of which fell under our consideration in a former volume [h]. The punishment of bakers' breaking the assise, was antiently to stand in the pillory, by statute 51 Hen. III. st. 6., and for brewers (by the same act) to stand in the tumbrel or dungcart [i]; which, as we learn from domesday book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the confessor. "*Malam cervisiam* "*faciens, in cathedra ponebatur stercoris* [i]." (8) But now the [158] general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade, or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory [k]. And by the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct. (9)

[h] See Vol. I. pag. 274.
[i] 3 Inst. 219.
[i] Seld. tit. of hon. b. 2. c. 5. § 3.
[k] 1 Hawk. P. C. c. 71. s. 3.

(7) See Burn's Justice, v. i. pp. 301. 363. ed. 23. The important statutes on this subject now are the 1 & 2 G. 4. c. 50. for the kingdom at large; and the 55 G. 3. c. xcix. (Local Act), as altered and amended by the 59 G. 3. c. cxxvii. (Local Act), for the city of London, and within ten miles of the Royal Exchange. The weight and materials of bread are by these acts put under very strict regulations.

(8) *Aut quatuor solidos dabat præpositis.*

(9) The clauses of the 30 G. 2. c. 24., which relate to the pawning of another's goods without the consent of the owner, are virtually repealed by the general pawnbroker's act, 39 & 40 G. 3. c. 99. (see Vol. II. p. 452.) which punishes the offence summarily by forfeitures and imprisonment in case of non-payment; the same statute also punishes summarily the forging

6. The offence of *forestalling* the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law[1], was described

[1] 1 Hawk. P.C. c.80. s.1.

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ing any pawnbroker's memorandum or ticket. The statutes of Hen. 8. and G.2., extended as the latter is by the 52G.3. c.64, form a very important head of our criminal law, upon which numerous decisions have taken place. The first of these provides for the offence of deceitfully getting possession of other persons' money, goods, chattels, jewels, or other things, by means of any false token, or counterfeit letter made in any other man's name. The necessity for this and the succeeding statutes arose from a principle in the law as to larceny, which will be noticed more fully hereafter, that wherever the owner of goods delivered them to another, and intended by the delivery to part not merely with the possession but the property of them, no larceny was committed by the person so receiving them, whatever fraudulent means he had used to prevail on the owner so to do. It should therefore be always borne in mind, that these statutes apply only to cases of such delivery; for without this caution we shall be apt to confound cases under them with cases of larceny at common law. The words of the statute of Hen. 8. are confined to goods, &c. obtained by means of a token, which must be some real visible mark or thing (as a key, or ring), calculated to gain the party using it some additional credit beyond his own assertions; or a letter, which must also be made in the name of a third person. This statute, thus expounded, was a very inadequate security against fraud; the statute of G.2., therefore, extends to goods, &c. obtained by any false pretence with intent to cheat. These words are very general, and there has been some doubt as to the extent in which they are to be understood; but it seems now to be determined that they are not to be restrained in their operation, but that wherever the pretence is false, and the money or other thing obtained by that pretence, the case is within the statute. Thus, where a Count V. told Sir T. B. that he was entrusted by the Duc de Lauzun to take some horses from Ireland to London, and that he had been detained so long by contrary winds that his money was spent, by which representation (being entirely fictitious) Sir T. B. was induced to advance him money; the case was held to be within the statute, and the defendant was sentenced to hard labour (3 T. R. 104.). And this case would have been equally so, if the story had been only false in part, supposing the false part had been the material inducement to part with the money. For it most commonly happens, that a false pretence is a matter made up of some truth as well as some falsehood, the former used as the vehicle of the latter. The object of the 52G.3. c.64. was to extend the protection of the statute of G.2. to corporate bodies, and to cases where not merely money, goods, &c. were obtained, but bonds, bills, bank notes, or any other security, or warrant for the payment of money, or delivery of goods. On this subject, generally, I cannot do better than refer the student to the case of the *King* v. *Young* and others, 3 T. R. 98., and 2 East's P. C. c. xviii. s. 8, or 2 Russ. P. C. 1385.

by statute 5 & 6 Edw. VI. c.14. to be the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. REGRATING was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

8. ENGROSSING was also described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any [159] other commodity, with intent to sell it at an unreasonable price, is an offence indictable and finable at the common law[m]. And the general penalty for these three offences by the common law (for all the statutes concerning them were repealed by 12 Geo. III. c.71.) is, as in other minute misdemesnors, discretionary fine and imprisonment[n]. Among the Romans these offences and other mal-practices to raise the price of provisions, were punished by a pecuniary mulct. "*Poena viginti aureorum statuitur adversus eum, qui contra "annonam fecerit, societatemve coierit quo annona carior "fiat*[o]."

9. MONOPOLIES are much the same offence in other branches of trade, that engrossing is in provisions (10): being a licence or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing

[m] Cro. Car. 232.
[n] 1 Hawk. P. C. c.80. s.5.
[o] *Ff.* 48. 12. 2.

(10) Hawkins states the difference to be only in this, that monopoly is by patent from the king, and engrossing by the act of the subject between party and party. Pl. C. 1. c. 79.

whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before [p]. These had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by sir Edward Coke [q], in the beginning of the reign of king James the first: but were in great measure remedied by statute 21 Jac. I. c. 3. which declares such monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot;) and monopolists are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb; and if they procure any action, brought against them for these damages, to be stayed by any extra-judicial order, other than of the court wherein it is brought, they incur the penalties of *praemunire*. Combinations also among victuallers or artificers, to raise the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; and in general by statute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10*l.* or twenty-one days' imprisonment, with an allowance of only bread and water, for the first offence; 20*l.* or the pillory, for the second; and 40*l.* for the third, or
[160] else the pillory, loss of one ear, and perpetual infamy. (11) In the same manner, by a constitution of the emperor Zeno [r], all monopolies and combinations to keep up the price of merchandize, provisions, or workmanship, were prohibited upon pain of forfeiture of goods and perpetual banishment.

10. To exercise a *trade* in any town, without having previously served as an *apprentice* for seven years [s], is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader: and therefore is punished by statute 5 Eliz. c. 4. with the forfeiture of forty shillings by the month. (12)

[p] 1 Hawk. P. C. c. 79.
[q] 3 Inst. 181.
[r] *Cod.* 4. 59. 1.
[s] See Vol. I. pag. 427.

(11) This statute is repealed by 5 G. 4. c. 95. See ante, p. 137. n
(12) This is repealed by 54 G. 3. c. 96.

11. Lastly, to prevent the destruction of our home manufactures by *transporting and seducing our artists* to settle abroad, it is provided by statute 5 Geo. I. c. 27. that such as so entice or seduce them shall be fined [any sum not exceeding] 100*l.* and be imprisoned three months: and for the second offence shall be fined at discretion, and be imprisoned a year: and the artificers, so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II. c. 13. the seducers incur, for the first offence, a forfeiture of 500*l.* for each artificer contracted with to be sent abroad, and imprisonment for twelve [calendar] months; and for the second, 1000*l.* and are liable to two years imprisonment: and by the same statute, connected with 14 Geo. III. c. 71., if any person exports any tools or utensils used in the silk, linen, cotton, or woollen manufactures, (excepting woolcards to North America [t],) he forfeits the same and 200*l.*, and the captain of the ship (having knowledge thereof) 100*l.*; and if any captain of a king's ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100*l.* and his employment; and is for ever made incapable of bearing any public office: and every person collecting such tools or utensils, in order to export the same, shall, on conviction at the assizes, [or quarter sessions,] forfeit such tools and also 200*l.* (13)

[t] Stat. 15 Geo. III. c. 5.

(13) These statutes, and several later, which had been made in pursuance of the same policy, so far as they relate to artificers going abroad, or the enticing them so to do, are now repealed by the 5 G. 4. c. 97.

CHAPTER THE THIRTEENTH.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR OECONOMY.

THE fourth species of offences, more especially affecting the commonwealth, are such as are against the public *health* of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

1. The first of these offences is a felony; but by the blessing of Providence for more than a century past, incapable of being committed in this nation. For by statute 1 Jac. I. c. 31. it is enacted, that if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it, he may be enforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command: and, if any hurt ensue by such inforcement, the watchmen are thereby indemnified. And farther, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour; but, if he has any infectious sore upon him, uncured, he then shall be guilty of felony. By the statute 26 Geo. II. c. 6. (explained and amended by 29 Geo. II. c. 8.) the method of performing *quarantine*, or forty days' probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given,

or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the *lazarets*, or places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarantine. (1)

9. A SECOND, but much inferior species of offence against public health is the selling of *unwholesome provisions*. To prevent which the statute 51 Hen. III. st. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25. § 11. any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant; and 40*l.* if done by the vintner or retail trader. These are all the offences which may properly be said to respect the public health. (2)

(1) The 45 G. 3. c. 10. and 46 G. 3. c. 98. are the laws now in force for the regulation of quarantine. Many offences described in these statutes are punished by pecuniary penalties and imprisonment; but it is felony, without benefit of clergy, for any master knowingly to omit disclosing that he has touched at any infected place, or has any infected person on board, or wilfully to omit, under such circumstances, the hoisting the yellow flag; it is also a capital offence for persons liable to perform quarantine to refuse to repair to the appointed place for performing it, or to escape from it; and for any officer of quarantine knowingly to permit any person, ship, or goods to depart, or be conveyed from such place, without permission of his majesty, or to give a false certificate of the due performance of quarantine. Persons uninfected who once enter a lazaret are laid under the same restrictions, and exposed to the same punishments, as those performing quarantine there. It is also a capital offence to convey clandestinely, or conceal for such purpose, any letters or goods from a ship in quarantine.

By the common law, it is a nuisance to expose persons infected with contagious disorders in streets or places of public resort; and therefore, though it is not unlawful to inoculate with the small-pox, yet it must be done under such guards, and the patients afterwards so managed as not to endanger the public health by the communication of the disease. *R.* v. *Vantandillo*, 4 M. & S. 73., and *R.* v. *Burnett*, 4 M. & S. 272.

(2) By 1 W. & M. st. 1. c. 34. s. 20., it is more generally provided that every person selling wine by wholesale or retail, who shall adulterate it, or

V. The last species of offences which especially affect the commonwealth, are those against the public *police* or *oeconomy*. By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. These amount, some of them to felony, and others to misdemesnors only. Among the former are,

1. The offence of *clandestine marriages*: for by the statute 26 Geo. II. c. 33. 1. To solemnize marriage in any other place besides a church, or public chapel wherein banns have been usually published, except by licence from the archbishop of
[163] Canterbury; — and, 2. To solemnize marriage in such church or chapel without due publication of banns, or licence obtained from a proper authority; — do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation for fourteen years: as, by three former statutes[a], he and his assistants were subject to a pecuniary forfeiture of 100*l*. 3. To make a false entry in a marriage register; to alter it when made; to forge, or counterfeit such entry, or a marriage licence; to cause or procure, or act or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage, or subject any person to the penalties of this act; all these offences, knowingly and wilfully committed, subject the party to the guilt of felony without benefit of clergy. (3)

[a] 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19. § 176.

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or sell it adulterated, shall forfeit 300*l*. for each offence, one half to the king, and the other to him who shall sue for it, and shall also be imprisoned three months.

(3) The 26 G. 2. c. 33. is now repealed; and by 4 G. 4. c. 76., 1st, to solemnize matrimony elsewhere than in a church, or such public chapel wherein

2. ANOTHER felonious offence, with regard to this holy estate of matrimony, is what some have corruptly called *bigamy*, which properly signifies being twice married; but is more justly denominated *polygamy*, or having a plurality of wives at once[b]. Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public oeconomy and decency of a well-ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems [164] to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us[c], "*prope soli barbarorum sin-*

[b] 3 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, *A.D.* 1274, held under pope Gregory X. were *omni privilegio clericali nudati, et coercioni fori secularis addicti.* (6 *Decretal.* 1. 12.) This canon was adopted and explained in England, by statute, 4 Edw. I. st. 3. c. 5. and *bigamy* thereupon became no uncommon counterplea to the claim of the benefit of clergy. (*M.* 40 *Ed. III.* 42. *M.* 11 *Hen. IV.* 11. 48. *M.* 13 *Hen. IV.* 6. Staundf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by statute 18 Ed. III. st. 3. c. 2. to belong to the court christian, like that of *bastardy*. But by stat. 1 Edw. VI. c. 12. §16. *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dyer, 201.

[c] *de mor. Germ.* 18.

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wherein banns *may be lawfully* published, or at any other time than between eight and twelve in the forenoon, except by licence from the archbishop of Canterbury; 2d, to solemnize it without due publication of banns, unless by licence from a competent authority; or, 3d, to solemnize it according to the rites of the church of England, falsely pretending to be in holy orders, are all made felonies, punishable, if prosecuted within three years from the commission of the offence, by transportation for fourteen years. And by the same act, 1st, to insert in a register-book any false entry of any thing relating to any marriage; 2d, to make, alter, or counterfeit, or assist in making, &c. any such entry, or any licence of marriage, or to utter the same as true, knowing it to be false; or, 3d, to destroy or procure the destruction of any register-book of marriages, or any part thereof, with intent to avoid any marriage, or subject any person to any of the penalties of the statute, are made felonies punishable by transportation for life.

"*gulis uxoribus contenti sunt.*" It is therefore punished by the laws both of antient and modern Sweden with death [d]. And with us in England it is enacted by statute 1 Jac. I. c. 11. that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is indeed no wife at all [e]; and so *vice versa*, of a second husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony [f]. 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them should marry again; I should apprehend that such second marriage would be within the reason and penalties of the act. (4)

[d] Stiernh. *de jure Sueon. l.* 3. *c.* 2.
[e] 1 Hal. P.C. 693.
[f] 3 Inst. 89. Kel. 27. 1 Hal. P.C. 694.

(4) It seems that by the old law, which for this purpose remained untouched by the 18 E. 3., bigamy was general, and special; the former embraced the cases which fall within the provisions of the statute of James, and the latter, some at least of those within it's exceptions; the former were placed by the statute of E. 3. under the cognisance of the bishop, the latter still remained to be tried by a jury. Thus if to the counter-plea of bigamy, the prisoner replied that the first marriage was void because contracted within the age of consent, and at full age disaffirmed, that issue was tried by the country. By the statute of James, and the 35 G. 3. c. 67. s. 1., this distinction is become unimportant; this latter statute punishes offences within the former in the same manner

as

3. A THIRD species of felony against the good order and oeconomy of the kingdom, is by idle *soldiers* and *mariners* [165] *wandering* about the realm, or persons pretending so to be, and abusing the name of that honourable profession [g]. Such a one not having a testimonial or pass from a justice of the peace, limiting the time of his passage, or exceeding the time limited for fourteen days, unless he falls sick; or forging such testimonial; is by statute 39 Eliz. c. 17. made guilty of felony without benefit of clergy. This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book: yet attended with this mitigation, that the offender may be delivered, if any honest freeholder or other person of substance will take him into his service, and he abides in the same for one year; unless licensed to depart by his employer, who in such case shall forfeit ten pounds (5).

4. OUTLANDISH persons calling themselves *Egyptians*, or *gypsies*, are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering impostors and jugglers, who were first taken notice of in Germany about the beginning of the fifteenth century, and have since spread themselves all over Europe. Munster [h], who is followed and relied upon by Spelman [i] and other writers, fixes the time of their first appearance to the year 1417; under passports, real or pretended, from the emperor Sigismund, king of Hungary. And pope Pius II. (who died *A. D.* 1464) mentions them in his history as thieves and vagabonds, then wandering with their families over Europe under the name of Zigari; and

[g] 3 Inst. 85. [h] *Cosmogr. l.* 3. [i] *Gloss.* 193.

as persons convicted of grand or petit larceny, and a return from transportation without lawful cause before the expiration of the term limited, is felony without benefit of clergy. See Staundf. Pl. C. 155.

The prisoner may be tried under the statute of James in the county in which he is apprehended; and therefore Hawkins thinks that where the second marriage, which is the offence, was celebrated beyond the sea, still the party might be tried for it in England; but the broad principle that an offence committed out of the jurisdiction of the law, cannot be cognisable by the law, is scarcely to be got over by mere inference; and it should be remembered besides, that both the statutes of James I. and George III. begin, "If any person or persons within his majesty's dominions of England and Wales, &c." Hawkins, 1. c. 42. s. 7. East's Pl. C. c. xii. s. 2.

(5) This statute was repealed by the 52 G. 3. c. 31.

whom he supposes to have migrated from the country of Zigi, which nearly answers to the modern Circassia. In the compass of a few years they gained such a number of idle proselytes, (who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging, and pilfering,) that they became troublesome, and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591 [k]. And the government in England took the alarm much earlier: for in 1530, they are described by statute 22 Hen. VIII. c. 10. as "outlandish people, calling themselves
[166] "Egyptians, using no craft nor feat of merchandize, who "have come into this realm and gone from shire to shire and "place to place in great company, and used great, subtil, "and crafty means to deceive the people; bearing them in "hand, that they by palmestry could tell men's and women's "fortunes; and so many times by craft and subtilty have "deceived the people of their money, and also have com-"mitted many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels: and upon their trials for any felony which they may have committed, they shall not be entitled to a jury *de medietate linguae*. And afterwards, it is enacted by statute 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. And if the Egyptians themselves remain one month in this kingdom; or if any person, being fourteen years old, (whether natural-born subject or stranger,) which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times, it is felony without benefit of clergy: and sir Matthew Hale informs us [l], that at one Suffolk assises no less than thirteen gypsies were executed upon these statutes a few years before the restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into practice (6).

[k] Dufresne. *Gloss. I.* 200. [l] 1 Hal. P.C. 671.

(6) The 5 Eliz. c. 20. was repealed by the 23 G. 3. c. 51., and the capital

5. To descend next to offences whose punishment is short of death. *Common nusances* are a species of offences against the public order and oeconomical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires[m]. The nature of *common* nusances, and their distinction from *private* nusances, were explained in the preceding volume[n]: when we considered more particularly the [167] nature of the private sort, as a civil injury to individuals. I shall here only remind the student, that common nusances are such inconvenient and troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects. Of this nature are, 1. Annoyances in *highways*, *bridges*, and public *rivers*, by rendering the same inconvenient or dangerous to pass, either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish [or county], at large, may be indicted, distrained to repair and amend them, and in some cases fined. And a presentment thereof by a judge of assise, &c. or a justice of the peace, shall be in all respects equivalent to an indictment[o] (7). Where there is a house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture*[p]. 2. All those kinds of nusances, (such as offensive trades and manufactures) which when injurious to a private man are actionable, are, when detrimental

[m] 1 Hawk. P.C. 75.1.
[n] Vol. III. pag. 216.
[o] Stat. 7 Geo. III. c. 42.
[p] Co. Litt. 277. from the French *pourpris*, an enclosure.

pital punishment under 1 & 2 Ph. & M. c. 4. by the 1 G. 4. c. 116. s. 1. Gypsies are now considered and punished merely as rogues and vagabonds under the vagrant acts. See 5 G. 4. c. 83.

(7) The 7 G. 3. c. 42. is repealed by the 13 G. 3. c. 78. (the general highway act), which at s. 24. contains a similar provision with that stated in the text.

to the public, punishable by public prosecution, and subject to fine, according to the quantity of the misdemesnor: and particularly the keeping of hogs in any city or market town is indictable as a public nusance[q](8). 3. All disorderly *inns* or *alehouses*, *bawdy-houses*, *gaming-houses*, *stage plays* unlicensed, booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nusances, and may upon indictment be suppressed and fined[r](9). Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the
[168] innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behaviour[s](10). Thus, too, the hospitable laws of Norway punish in the severest degree, such inn-keepers as refuse to furnish accommodations at a just and reasonable price[t]. 4. By statute 10 & 11 W. III. c. 17. all *lotteries* are declared to be public nusances, and all grants, patents, or licences for the same to be contrary to law. But, as state-lotteries have, for many years past, been found a ready mode for raising the supply (11), an act was made 19 Geo. III. c. 21. to license and regulate the keepers of such lottery-offices. 5. The making and selling of *fire-works*, and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common

[q] Salk. 460.
[r] 1 Hawk. P. C. c. 74. & 75. s. 6.
[s] 1 Hawk. P. C. c. 78. s. 2.
[t] Stiernh. *de jure Sueon. l. 2. c. 9.*

(8) It must be understood that they are kept in such inconvenient parts of the city or town that they cannot but greatly incommode the neighbourhood. 5 Bac. Abr. Nusance.

(9) See ante, p. 65. n. (16)

(10) Hawkins only says the innkeeper may be indicted and fined; Dalton, certainly, to whom he refers, c. 7. says, that the "alehouse-keeper may be suppressed:" but I do not imagine that a suppression of the inn can follow in the present day as any part of the punishment inflicted under an indictment at common law; though undoubtedly a refusal of the licence may follow as an indirect consequence.

(11) It might be said with more truth perhaps, "a very small part of the supply;" for I believe the produce of the state-lottery has seldom been estimated for many years but at a very inconsiderable sum. The last lottery-act 4 G. 4. c. 60. s. 19., holds out an expectation that the practice of raising money by means so objectionable will be henceforward discontinued, and makes some provisions, which would in that case become necessary.

nusance, by statute 9 & 10 W. III. c. 7. and therefore is punishable by fine. And to this head we may refer (though not declared a common nusance) the making, keeping, or carriage, of too large a quantity of *gunpowder* at one time, or in one place or vehicle; which is prohibited by statute 12 Geo. III. c. 61. under heavy penalties and forfeiture (12). 6. *Eaves-droppers*, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nusance, and presentable at the court-leet[t]: or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour[u]. 7. Lastly, a *common scold*, *communis rixatrix*, (for our law-latin confines it to the feminine gender,) is a public nusance to her neighbourhood. For which offence she may be indicted[v]; and if convicted, shall[w] be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool, which in the Saxon language is said to signify the scolding stool; though now it is frequently corrupted into *ducking* stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment[x] (13).

6. IDLENESS in any person whatsoever is also a high of- [169]
fence against the public oeconomy. In China it is a maxim,

[t] Kitch. of courts. 20.
[u] *Ibid.* 1 Hawk. P.C. c. 61. s. 4.
[v] 6 Mod. 11.
[w] 1 Hawk. P.C. c. 75. ss. 5—14.
[x] 3 Inst. 219.

(12) There are authorities to shew that this was a nusance at common law before the 12 G. 3. c. 61., or the 22 G. 2. c. 38. which was the preceding statute on the subject. See Russell's C. L. 1. 430.

(13) The annoyance or neglect which the law will hold to be a nusance, must certainly be of a real and substantial nature; but it seems, with submission, to be too strongly said by a very eminent judge, in 3 Atk. 751., that the fears of mankind, though reasonable, will not create a nusance. The case, in which he said it, did not require any thing so strong, for it was an application to restrain the building of an inoculation house in Cold Bath Fields, where the fear, though perhaps excusable, was in reality not reasonable, not justly deduced from sufficient premises. But if the fear be so, (as where gunpowder-mills are erected, or gunpowder magazines or manufactures for vitriol, aquafortis, &c. kept in or close to a town,) there can be no doubt, I should imagine, but that it is a nusance punishable by indictment, anterior to any actual damage produced; in other words, that dan-

that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger: the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants: and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus at Athens punished idleness and exerted a right of examining every citizen in what manner he spent his time; the intention of which was [y], that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city [z]: and, in our own law, all idle persons or vagabonds, whom our antient statutes describe to be "such as wake on the night, and sleep on the day, and "haunt customable taverns, and ale-houses, and routs about; "and no man wot from whence they come, ne whither they "go," or such as are more particularly described by statute 17 Geo. II. c. 5. and divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues*;— all these are offenders against the good order, and blemishes in the government of any kingdom. They are therefore all punished by the statute last mentioned; that is to say, idle and disorderly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six months; and incorrigible rogues with the like discipline and confinement, not exceeding two years; the breach and escape from which confinement in one of an inferior class, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon, and liable to be transported for seven years. Persons harbouring vagrants are liable to a fine of forty shillings, and to pay all expences brought upon the parish thereby: in the same man-
[170] ner as, by our antient laws, whoever harboured any stranger for more than two nights, was answerable to the public for any offence that such his inmate might commit [a]. (14)

[y] Valer. Maxim. *l.* 2. *c.* 6.
[z] *Nov.* 80. *c.* 5.
[a] *LL. Edw.* c. 27. Wilk. 202. *Bracton. l.* 3. *tr.* 2. *c.* 10. § 2.

gerous consequences reasonably apprehended, or feared, make a thing a nusance. *R.* v. *Williams*, Russell, C. L. 430. n. (o). *R.* v. *Taylor*, 2 Str. 1167.

(14) This rule seems to have grown into a familiar and proverbial saying,

7. UNDER the head of public oeconomy may also be properly ranked all sumptuary laws against *luxury*, and extravagant expences in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu lays it down [b], that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question how far private luxury is a public evil; and as such cognizable by public laws. (15) And indeed our legislators have several times changed their sentiments, as to this point; for formerly there were a multitude of penal laws existing, to restrain excess [171] in apparel [c]; chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I. c. 25. But, as to excess in diet, there still remains one antient statute unrepealed, 10 Ed. III. st. 3. which ordains, that no man shall be served, at dinner or supper, with more than two courses; except upon some great holidays there specified, in which he may be served with three.

8. NEXT to that of luxury, naturally follows the offence of *gaming*, which is generally introduced to supply or retrieve

[b] Sp. L. b. 7. c. 2. and 4. [c] 3 Inst. 199.

saying, even so early as the Confessor's time; the expression of the law is, *quod Anglicè dicitur, twa night gest, thrid night agen hine*, which Meyer renders into Dutch, with scarcely any alteration, *twee nachten gast, derde nacht eigen*. All prior statutes relative to idle and disorderly persons, rogues and vagabonds, incorrigible rogues or other vagrants, have been repealed by the 5 G. 4. c. 83. The same threefold division is adopted by this statute, but the enumeration of individuals in each class is so minute that it is impossible to abstract it within the compass of a note; the first and second classes are respectively punishable by a single magistrate with one and three calendar months' imprisonment, and hard labour; individuals in the third are to be committed to the next sessions, and kept to hard labour in the interval; and by the sessions may be further imprisoned for one year with hard labour, and if not females, may be whipped during their imprisonment.

(15) See Berkeley's Minute Philosopher, where the fallacy of the political argument in favour of luxury and excess is beautifully exposed.

the expences occasioned by the former: it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft, and debauchery among those of a lower class; and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of antient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder. To restrain this pernicious vice, among the inferior sort of people, the statute 33 Hen. VIII. c. 9. was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified [d], unless in the time of christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. II. c. 24. inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game, as upon the servants themselves who
[172] are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors the antient Germans; whom Tacitus [e] describes to have been bewitched with a spirit of play to a most exorbitant degree. "They addict themselves," says he, "to dice (which is wonderful) when sober, and as a serious employment; with "such a mad desire of winning or losing, that, when stript "of every thing else, they will stake at last their liberty "and their very selves. The loser goes into a voluntary "slavery, and though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honour: "*ea est in re pravâ pervicacia, ipsi fidem vocant.*" One would almost be tempted to think Tacitus was describing a modern

[d] Logetting in the fields, slide thrift or shove-groat, cloyish cayles, half-bowl, and coyting.

[e] *de mor. Germ. c.* 24.

Englishman. When men are thus intoxicated with so frantic a spirit, laws will be of little avail; because the same false sense of honour, that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or if unsuccessful, have it in their power to be still greater gainers by informing. For by statute 16 Car. II. c.7. if any person by playing or betting shall lose more than 100*l.* at one time, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute 9 Ann. c.14. enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void (16); that all mortgages and incumbrances of lands, made upon the same consideration, shall be and enure to the use of the heir of the mortgagor; that, if any person at any time or sitting loses 10*l.* at play, he may [within three months] sue the winner, and recover it back by action of debt at law; and in case the loser does not, any other person may sue the winner for treble the sum so lost; and the plaintiff may by bill in equity examine the defendant himself upon oath; and that in any of these suits no privilege of parliament shall be allowed. (17) The

(16) In *Bowyer* v. *Bampton*, 2 Strange, 1155. it was determined that where a promissory note so given had been indorsed for a valuable consideration to an innocent person, ignorant of the original transaction out of which it had arisen, he could maintain no action on it against the maker, though he might against the indorser. For that whatever were the hardship to the innocent individual, this was the only mode to prevent an evasion of the statute. The same determination prevailed under another statute with respect to securities given upon a usurious consideration, but the 58 G. 3. c. 93. has altered the law in that respect, enacting that no bill of exchange or promissory note, though given originally for a usurious consideration, shall be void in the hands of an indorsee for a valuable consideration, who had at the time no notice of the original taint.

(17) The statute gives the common informer a right to sue for the sum lost, *and* treble the value; the one moiety to his own use, and the other to the use of the poor of the parish, in which the offence was committed. It is stated, too generally, that the "plaintiff" is entitled to a discovery upon oath; for in a case not reported, of *Holloway* v. *Cookson*, Mich. 40 G. 3., and in that of *Orme* v. *Crockford*, Easter, 5 G. 4. MS., the Court

statute farther enacts, that if any person by cheating at play shall win any money or valuable thing, or shall at any one time or sitting win more than 10*l.*, he may be indicted thereupon, and shall forfeit five times the value to any person who will sue for it; and (in case of cheating) shall be deemed infamous, and suffer such corporal punishment as in case of wilful perjury. By several statutes of the reign of king George II.[f], all private lotteries by tickets, cards, or dice, (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly polly, and all other games with dice, except back-gammon,) are prohibited under a penalty of 200*l.* for him that shall erect such lotteries, and 50*l.* a time for the players. Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes[g] under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II. c. 19. to prevent the multiplicity of horse races, another fund of gaming, directs that no plates or matches under 50*l.* value shall be run, upon penalty of 200*l.* to be paid by the owner of each horse running, and 100*l.* by such as advertise the plate. By statute 18 Geo. II. c. 34. the statute 9 Ann. is farther enforced, and some deficiencies supplied; the forfeitures of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or losing at play, or by betting at any one time 10*l.* or 20*l.* within twenty-four hours, he shall be fined five times the sum for the benefit of the poor of the parish. Thus careful has the legislature been to prevent this destructive vice; which may shew that our laws against gaming
[174] are not so deficient, as ourselves and our magistrates in putting those laws in execution.

[f] 12 Geo. II. c. 28. 13 Geo. II. c. 19. 18 Geo. II. c. 34.

[g] 10 & 11 W. III. c. 17. 9 Ann. c. 6. § 56. 10 Ann. c. 26. § 109. 8 Geo. I. c. 2. § 36, 37. 9 Geo. I. c. 19. § 4, 5. 6 Geo. II. c. 35. § 29, 30.

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of exchequer decided that the statute gave that benefit only to the party seeking to recover what he had lost, and not to the informer suing for the penalties.

9. LASTLY, there is another offence, constituted by a variety of acts of parliament; which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern: associations having been formed all over the kingdom to prevent it's destructive progress. I mean the offence of destroying such beasts and fowls, as are ranked under the denomination of *game*; which, we may remember, was formerly observed [h], (upon the old principles of the forest law,) to be a trespass and offence in all persons alike, who have not authority from the crown to kill game, (which is royal property,) by the grant of either a free warren, or at least a manor of their own. But the laws, called the game laws, have also inflicted additional punishments (chiefly pecuniary) on persons guilty of the general offence, unless they be people of such rank or fortune as is therein particularly specified. All persons therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's licence expressed by the grant of a franchise, are guilty of the first original offence, of encroaching on the royal prerogative. And those indigent persons who do so, without having such rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations also, created by the statutes for preserving the game: which aggravations are so severely punished, and those punishments so implacably inflicted, that the offence against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the present head, because the only rational footing, upon which we can consider it as a crime, is, that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings; which is an offence against the public police and oeconomy [175] of the commonwealth.

THE statutes for preserving the game are many and various, and not a little obscure and intricate: it being re-

[h] See Vol. II. pag 417, &c.

marked [i], that in one statute only, 5 Ann. c. 14. there is false grammar in no fewer than six places, besides other mistakes; the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not at present inquire. It is in general sufficient to observe, that the *qualifications* for killing game, as they are usually called, or more properly the *exemptions* from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100*l.* *per annum*; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire: 2. A leasehold for ninety-nine years of 150*l.* *per annum*: 3. Being the son and heir apparent of an esquire (a very loose and vague description), or person of superior degree: 4. Being the owner, or keeper, of a forest, park, chase, or warren. (18) For unqualified persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game or have it in possession, at unseasonable times of the year, or unseasonable hours of the day or night, on Sundays or on Christmas day, there are various penalties assigned, corporal and pecuniary, by different statutes [k]; on any of which, but only on one at a time, the justices may convict in a summary way, or (in most of them)

[i] Burn's Justice, Game, § 3. [k] *Ibid.* tit. Game.

(18) The words of the statute 22 & 23 C. 2. c. 25. are "lands and tenements, or some other estate of inheritance in his own or his wife's right, of the clear yearly value of 100*l.* per annum, or for a term of life, or lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.*" The estate, therefore, of 100*l.* per annum must be an estate of inheritance; a mere freehold will not suffice, nor is the freehold necessary; it may be a copyhold or equitable estate. The term "clear yearly value" will not be satisfied, if the rent of the land is reduced below the 100*l.* by the payment of the interest of a mortgage on it. A life estate must be of the annual value of 150*l.*, which construction has been given to the statute on comparing it with former qualification laws, in which the policy has always been to increase the value where the interest is only for life. The exceptions of the statute are worded thus: "other than the son and heir-apparent of an esquire, or other person of higher degree." Within these words, neither an esquire, nor person of higher degree, are included; all persons down to knights and colonels, serjeants at law, and doctors in the three learned professions, are of higher degree than esquires. See Vol. I. p. 405., and the cases collected in Selwyn's *Ni. Pri.* 877. 6 Ed.

prosecutions may be carried on at the assizes. And, lastly, by statute 28 Geo. II. c. 12. no person, however qualified to *kill*, may make merchandize of this valuable privilege, by *selling* or exposing to sale any game, on pain of like forfeiture as if he had no qualification. (19)

(19) The 58 G. 3. c. 75. has imposed a penalty of 5*l*. on the buying of game, a regulation almost indispensable as a part of the present system of game laws; but the system itself has been repeatedly before the legislature within a few years, and though difficulties have occurred, which have caused the subject to be as often thrown aside, yet it seems certain that some fundamental change will take place in it ere long, and, therefore, I think it unnecessary to give an account of the various decisions which are reported on the present state of these laws.

CHAPTER THE FOURTEENTH.

OF HOMICIDE.

IN the ten preceding chapters we have considered, first, such crimes and misdemesnors as are more immediately injurious to God, and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people; fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure *individuals* or private subjects.

WERE these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our inquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is,
[177] that, besides the private satisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the

king, in whom by the texture of our constitution the *jus gladii*, or executory power of the law, entirely resides. Thus too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and, thirdly, for the crime against the public by their evil example[a]. Of which we may trace the groundwork, in what Tacitus tells us of his Germans[b]; that, whenever offenders were fined, "*pars mulctae* "*regi, vel civitati, pars ipsi, qui vindicatur vel propinquis ejus,* "*exsolvitur.*" (1)

These crimes and misdemesnors against private subjects are principally of three kinds; against their *persons*, their *habitations*, and their *property*.

Of crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be the offence of *homicide* or destroying the life of man, in it's several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

Now homicide, or the killing of any human creature, is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man [178] is capable of committing.

[a] Stiernhook, *l.* 1. *c.*5. [b] *de mor. Germ. c.*12.

(1) See ante, p. 5. 7. In the French law, the crime and the civil injury are kept distinct; the action for damages may go on at the same time with, or after the public prosecution, and before the same judges and jury. *Code d'Instruction Criminelle.* Disp. Prel.

I. Justifiable homicide is of divers kinds.

1. Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted, or outlawed, deliberately, uncompelled, and extrajudicially, is murder [c]. For, as Bracton [d] very justly observes, "*istud* "*homicidium, si fit ex livore, vel delectatione effundendi hu-*"*manum sanguinem, licet justè occidatur iste, tamen occisor* "*peccat mortalitur, propter intentionem corruptam.*" And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder [e]. And upon this account sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission [f]; a distinction perhaps rather too refined; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. (2) Also such judgment, when legal,

[c] 1 Hal. P. C. 497.
[d] *l.* 3. *tr.* 2. *c.* 4.
[e] 1 Hawk. P. C. c. 28. s. 4. 1 Hal. P. C. 497.
[f] Burnet in his life.

(2) It appears from his life, that for some time after his elevation to the bench till the execution of Ch. 1., sir M. Hale sate indifferently on both sides of the court on the circuit; but that even then "he made distinction between common and ordinary felonies, and offences against the state; for the last he would never meddle in them, for he thought these might be often legal and warrantable actions, and that the putting men to death on that account was murder; but for the ordinary felonies, he at first was of opinion, that it was as necessary even in times of usurpation to execute justice in those cases, as in matters of property." pp. 38. 40.

must be executed by the proper officer, or his appointed deputy; for no one else is *required* by law to do it, which requisition it is, that justifies the homicide. If another person doth it of his own head, it is held to be murder[g]: even though [179] it be the judge himself[h]. It must farther be executed, *servato juris ordine;* it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versâ*, it is murder[i]: for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law: but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide, and besides, this licence might occasion a very gross abuse of his power. The king indeed may remit part of a sentence; as in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is *to be hanged*, the king (it hath been said) cannot legally order even a peer to be beheaded[k]. But this doctrine will be more fully considered in a subsequent chapter. (3)

AGAIN; in some cases homicide is justifiable, rather by the *permission*, than by the absolute *command*, of the law, either for the *advancement* of public *justice*, which without such indemnification would never be carried on with proper vigour: or, in such instances where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided.

2. HOMICIDES, committed for the *advancement* of public *justice*, are; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him[l]. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him[m].

[g] 1 Hal. P.C. 501. 1 Hawk. P.C. c. 28. s. 9

[h] Dalt. Just. c. 150. Finch. L. 31. 3 Inst. 52. 1 Hal. P.C. 501.

[k] 3 Inst. 52. 212.

[l] 1 Hal. P. C. 494. 1 Hawk. P.C. c. 28. ss. 11, 12. 17, 18.

[m] 1 Hal. P. C. 494.

(3) See post, Ch. 32.

This is similar to the old Gothic constitutions, which (Stiernhook informs us [n]) "*furem si aliter capi non posset, occidere*
[180] "*permittunt.*" 3. In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law [o], and by the riot act, 1 Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape [p]. 5. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain; by virtue of the statute 21 Edw. I. st. 1. *de malefactoribus in parcis*, and 3&4 W. & M. c. 10. (4) But in all these cases, there must be an apparent necessity on the officer's side; *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. 6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth [q]. (5)

In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature [r]; and also by the law of England, as it stood so early as the time of Bracton [s], and as it is since declared by statute 24 Hen. VIII. c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house, *in the night-time*, (which extends also to an attempt to burn it [t],) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house *in the day time*, unless it

[n] *de jure Goth. l.* 3. *c.* 5.
[o] 1 Hal. P.C. 495. 1 Hawk. P.C. c. 65. ss. 11, 12.
[p] 1 Hal. P.C. 496.
[q] 1 Hawk. P.C. c. 28. s. 16.
[r] Puff. de j.n. & g. *l.* 2. *c.* 5.
[s] *l.* 3. *tr.* 2. *c.* 36.
[t] 1 Hal. P.C. 488.

(4) The statute 3&4 W. & M. c. 10. was repealed by 16 G. 3. c. 30.
(5) See Vol. III. p. 337. (7)

carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of *nocturnal* house-breaking; "if a thief be found breaking up, and he be "smitten that he die, there [181] "shall no blood be shed for him: if the sun be risen upon "him, there shall be blood shed for him; for he should "make full restitution [u]." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact [w]: and, by the Roman law of the twelve tables, a thief might be slain by night with impunity: or even by day, if he armed himself with any dangerous weapon [x]: which amounts very nearly to the same as is permitted by our own constitutions. (6)

THE Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations [y]: and so also, according to Selden [z], stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish her [a]: and so too the husband or father may justify killing a man who attempts a rape upon his wife or daughter: but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other [b]. (7) And I make no doubt but the forcibly attempt-

[u] Exod. xxii. 2.

[w] Potter. Antiq. b. 1. c. 24.

[x] Cic. *pro. Milone*, 3. *Ff.* 9. 2. 4.

[y] "*Divus Hadrianus rescripsit eum, "qui stuprum sibi vel suis inferentem oc- "cidit, dimittendum.*" (*Ff.* 48. 8. 1.)

[z] *de legib. Hebraeor. l.* 4. *c.* 3.

[a] Bac. Elem. reg. 5. 1 Hawk. P.C. c. 28. s. 21.

[b] 1 Hal. P. C. 485, 486.

(6) The French law proceeds on the same distinction; if death be occasioned in resisting the breaking into a dwelling-house or outhouse in the day-time, it is excusable homicide, and punishable by imprisonment from one year to five; but it is styled "an actual necessity of lawful defence," which imports no crime at all, when the same event happens in resisting a nocturnal attack or robbery, or plunder attempted to be committed at any time with actual personal violence. Code Pénal, liv. iii. t. 2. § 322. 326. 329.

(7) The French law probably includes the two first cases in this sentence under the head of necessary and lawful self-defence; as to the third, it makes it excusable homicide for the husband to kill his wife and her paramour at the moment that he takes them in the act of adultery in the family dwelling-house; while he himself is subjected to a small pecuniary fine, which may be lower than 5*l.* for keeping a mistress in the same house. (*La maison conjugale.*) Code Pénal, liv. iii t. 2. § 324. 339.

ing a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does: who holds[c], "that all manner "of force without right upon a man's person, puts him in a "state of war with the aggressor; and, of consequence, that "being in such a state of war, he may lawfully kill him that "puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other well-regulated
[182] community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death. (8)

In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error, or omission: so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

[c] Ess. on gov. p. 2. c. 5.

(8) In cases of justifiable homicide, a man is not obliged to retreat in the first instance, and he may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing, it is still justifiable self-defence. But a bare fear of any of these attacks, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such intention, will not warrant him in killing that other by way of prevention; there must be an actual danger at the time. If, however, the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and upon that supposition kill him, this may be misadventure, manslaughter [or even murder], according to circumstances. See East's P.C. c. 5. s. 44.

II. EXCUSABLE homicide is of two sorts; either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

1. HOMICIDE *per infortunium* or *misadventure*, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man[d]: for the act is lawful, and the effect is merely accidental. (9) So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure: for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder[e]; for the act of immoderate correction is unlawful. Thus, by an edict of the emperor Constantine[f], when the [183] rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner, "*immoderatè suo jure utatur, tunc reus* "*homicidii sit.*"

BUT to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so

[d] 1 Hawk. P.C. c.29. § 1.6. [e] 1 Hal. P.C. 473, 474. [f] *Cod. l.9. t.14.*

(9) Mr. J. Foster includes under the term lawful in this rule, all such acts as are not unlawful *in se* — and says, "if the act from which death ensued were barely *malum prohibitum*, as shooting at game by a person not qualified by the statute-law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man, for the statutes prohibiting the destruction of game *under certain penalties* will not, in a question of this kind, enhance the accident beyond its intrinsic moment. p. 259.

are boxing and sword-playing, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. (10) But if the king command or permit such diversion, it is said to be only misadventure; for then the act is lawful[g]. In like manner, as by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the state, was not held to be guilty of homicide[h]. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence[i]. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts[k].

2. Homicide in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a
[184] matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*, the for-

[g] 1 Hal. P.C. 473. 1 Hawk. P.C. c.29. § 8.
[h] Plato, *de LL. lib.*7. *Vf.*9.2.7. Fost.261.
[i] 1 Hawk. P.C. c.29. § 3.
[k] *Ibid.* c.29. § 4. 1 Hal. P.C.472.

(10) There seems to be a solid distinction between boxing and fencing, which was adverted to in the case of *Hunt* v. *Bell*, 1 Bingh.2. To teach and learn to box and to fence are equally lawful; they are both the art of self-defence; but sparring exhibitions are unlawful, because they tend to form prize fighters, and prize fighting is illegal; but fencing exhibitions have no similar tendency.

mer of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5. and our ancient books[l], that it is properly applied to such killing as happens in self-defence upon a sudden rencounter[m]. This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) from that of manslaughter, in the proper legal sense of the word[n]. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence[o]. For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, [185] before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honour: because the king

[l] Staunf. P. C. 16.
[m] 3 Inst. 55. 57. Fost. 275, 276.
[n] 3 Inst. 55.
[o] Fost. 277.

and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves [p]. In this the civil law also agrees with ours, or perhaps goes rather farther; "*qui cum aliter tueri se non possunt, damni culpam* "*dederint, innoxii sunt* [q]." The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him [r]: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice [s], as well as of the municipal law.

AND as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design [t]. But if A upon a sudden quarrel, assaults B first, and upon B's returning the assault, A really and *bonâ fide* flees; and, being driven to the wall, turns again upon B and kills him: this may be *se defendendo* according to some of our
[186] writers [u]; though others [w] have thought this opinion too favourable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. (11) Under this

[p] 1 Hal. P.C. 481, 483.
[q] *Ff.* 9. 2. 45.
[r] 1 Hal. P.C. 483.
[s] Puff. l. 2. c. 5. § 13.
[t] 1 Hal. P.C. 479.
[u] 1 Hal. P.C. 482.
[w] 1 Hawk. P.C. c. 29. § 17.

(11) The case here put doubtfully was stated absolutely a few sentences before, on the authority of Foster, p. 277., as a case of excusable self-defence. Foster says, as in the case of manslaughter upon sudden provocations, where the parties fight on equal terms, all malice apart, it mattereth not who gave the first blow; so in this case of excusable self-defence, I think the first assault in a sudden affray, all malice apart, will make no difference, *if either party quitteth the combat, and retreateth before a mortal wound be given.* In East's Pl.C. ch. v. § 53. the same doctrine is maintained.

excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself[x].

THERE is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by lord Bacon[y], where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expence of another man's, is excusable through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life. (12)

LET us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defence, agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who therefore is not altogether faultless[z]. And as to the necessity which excuses a man who kills another *se defendendo*, lord Bacon[a] entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law in- [187]

[x] 1 Hal. P. C. 484.
[y] Elem. reg. 5. See also 1 Hawk. P. C. c. 28. § 26.
[z] 1 Hawk. P. C. c. 28. § 24.
[a] Elem. reg. 5.

(12) Conf. Cic. de Offic. l. iii. c. xxiii.

tends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side. The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

Nor is the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it. And the Mosaical law[b] appointed certain cities of refuge for him "who "killed his neighbour unawares: as when a man goeth into "the wood with his neighbour to hew wood, and his hand "fetcheth a stroke with the ax to cut down the tree, and the "head slippeth from the helve, and lighteth upon his neigh-"bour that he die, he shall flee unto one of those cities and "live." But it seems he was not held wholly blameless, any more than in the English law; since the avenger of blood might slay him before he reached his asylum, or if he afterwards stirred out of it till the death of the high priest. In the imperial law likewise[c] casual homicide was excused, by the indulgence of the emperor signed with his own sign manual, "*annotatione principis:*" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks[d] homicide by misfortune was expiated
[188] by voluntary banishment for a year[e]. In Saxony a fine is paid to the kindred of the slain; which also, among the Western Goths, was little inferior to that of voluntary homi-

[b] Numb. c.35. and Deut. c.19.

[c] *Cod.* 9. 16. 5.

[d] Plato, *de Leg. lib.* 9.

[e] To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles in the twenty-third Iliad, that when a child he was obliged to flee his country for casually killing his play-fellow; "νηπιος οὐκ ἐθελων."

cide[f]: and in France[g] no person is ever absolved in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed. (13)

THE penalty inflicted by our laws is said by sir Edward Coke to have been antiently no less than death[h]; which however is with reason denied by later and more accurate writers[i]. It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*[k]: which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach[l], a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same[m]. And indeed to prevent this expence, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal[n].

III. FELONIOUS homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

[f] Stiernh. *de jure Goth*, l.3. c.4.
[g] De Morney, on the digest.
[h] 2 Inst. 148. 315.
[i] 1 Hal. P.C. 425. 1 Hawk. P.C. c.29. § 21. Fost. 282, &c.
[k] Fost. 287.
[l] Fost. 283.
[m] 2 Hawk. P.C. c. 37. § 2.
[n] Fost. 288.

(13) See ante, p. 181. n. 6. The French law adopts a distinction between homicide by misadventure, and excusable homicide, but the latter corresponds more exactly with our manslaughter than with our *se defendendo*, and is subjected to a heavier punishment. Homicide by awkwardness (*maladresse*), imprudence, inattention, negligence, inobservance of rules, must always be involuntary, which is not the case with homicide *se defendendo;* the punishment is imprisonment varying from three months to two years, and a fine from 60 to 600 francs. The French law has no division of this crime corresponding exactly with our *se defendendo*. Code Pénal, liv. iii. tit. 2. § 319.

SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law[o], yet was punished by the Athenian law with cutting off the hand which committed the desperate deed[p]. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it; and as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder[q]. A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if attempting to kill another, he runs upon his antagonist's sword: or shooting at another the gun bursts and kills himself[r]. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, *viz.* that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was ob-
[190] served in a former chapter[s], to form a legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man[t].

[o] "*Si quis impatientia doloris, aut "taedio vitae, aut morbo, aut furore, "aut pudore, mori maluit, non animadvertatur in eum*" *Ff.* 49. 16. 6.

[p] Pot. Antiq. b. 1. c. 26.

[q] Keilw. 136.

[r] 1 Hawk. P. C. c. 27. § 4. 1 Hal. P. C. 413.

[s] See pag. 24.

[t] 1 Hal. P. C. 412.

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former by an ignominious burial in the highway, with a stake driven through his body (14); on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into thewater he forfeits the term; which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death[u]. And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this (as on all other occasions) is reminded by the oath of his office to execute judgment in mercy.

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart.

[u] Finch. L. 216.

(14) The law is altered in this respect by the 4 G. 4. c. 52., which directs that a person *felo de se* shall be buried without any stake driven through the body privately in a church-yard, within twenty-four hours from the finding of the inquisition, and between the hours of nine and twelve at night; but the statute does not authorize the performing the rites of christian burial.

1. Manslaughter is therefore thus defined [v], the unlawful killing of another without malice either express or implied (15): which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. These were called in the Gothic constitutions "*homicidia vulgaria; quae aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiae calore et impetu*[w]." And hence it follows, that in manslaughter there can be no accessaries before the fact; because it must be done without premeditation.

As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion [x]: and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter [y]. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder [z]. So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solon [a], as likewise by the Roman civil law, (if the adulterer

[v] 1 Hal. P. C. 466.
[w] Stiernh. *de jure Goth. l.* 3. *c.* 4.
[x] 1 Hawk. P.C. c. 31. § 29.
[y] Kelyng. 135.
[z] Fost. 296.
[a] Plutarch. *in vit. Solon.*

(15) Hale's definition in the place referred to varies from that in the text, by substituting the word "voluntary" for "unlawful." Blackstone's definition is large enough to include homicide *se defendendo;* perhaps the word "felonious" would be the proper qualification; the felony would then distinguish it from excusable homicide, and the absence of malice, from murder.

was found in the husband's own house [b],) and also among the antient Goths [c]; yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter [d]. (16) It is however the lowest [192] degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation [e]. Manslaughter therefore on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor: in the other no necessity at all, being only a sudden act of revenge.

THE second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief [f]. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning [g]; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind [h]. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter [i], according to the nature of

[b] *Ff.* 48. 5. 24.
[c] Stiern. *de jure Goth.* l. 3. c. 2.
[d] 1 Hal. P. C. 486.
[e] Sir T. Raym. 212.
[f] 3 Inst. 56.
[g] Kel. 40.
[h] 3 Inst. 57.
[i] Our statute law has severely ani-

(16) See ante, p. 181. (n. 7.)

the act which occasioned it. If it be in prosecution of a felo-
[193] nious intent, or in its consequences naturally tended to blood-shed, it will be murder; but, if no more was intended than a mere civil trespass, it will only amount to manslaughter[j].

Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels. (17)

But there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. I. c. 8. when one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English at the accession of James the first[k], and being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. For in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt: unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the

madverted on one species of criminal negligence, whereby the death of a man is occasioned. For by statute 10 Geo. II. c. 31. if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.

[j] Foster, 258. 1 Hawk. P. C. c. 31. § 41.

[k] Lord Raym. 140.

(17) By the 3 G. 4. c. 38. this punishment is altered, and manslaughter now subjects the prisoner to transportation for life or years, to imprisonment with or without hard labour for any term not exceeding three years, or to a pecuniary fine, at the discretion of the court; and the suffering the punishment, or paying the fine, has all the same effects and consequences as the suffering the former punishment of burning, &c. had.

benignity of the law hath construed the statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing, as it did at the common law[l]. Thus, (not to repeat the cases before-mentioned, of stabbing an adulteress, &c. which are barely manslaughter, as at common law,) in the construction of this statute it hath been doubted, whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and it seems to be the better opinion, that this is not within the statute[m]. Also it hath been resolved, that the killing a man by throwing [194] a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted[n]. But if the party slain had a cudgel in his hand, or had thrown a pot or a bottle, or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the staute[o]. (18)

2. We are next to consider the crime of deliberate and wilful *murder*; a crime at which human nature starts, and which is I believe punished almost universally throughout the world with death. The words of the Mosaical law (over and above

[l] Fost. 299, 300.
[m] Fost. 301. 1 Hawk. P.C. c. 30. § 6.
[n] 1 Hal. P.C. 470.
[o] 1 Hawk. P.C. c. 30. § 8.

(18) The same benignity of construction has prevailed in all other questions which have arisen on this statute. Thus, the words being "every person and persons who shall stab, &c.," would, upon general principles, include all who were present and consenting to the act done, but they are confined to the very person who gives the stab or thrust. Therefore where several were indicted on the statute, and it did not appear which of them made the thrust, they were convicted of manslaughter only at common law, and had their clergy. On the other hand, the words being "stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken," are held to include all present aiding the party killed; so that where A. and B. came to C.'s lodgings, and B. stood with a sword drawn at the door to keep C. from going out, till a bailiff should come to arrest him for a debt due to A.; and upon some altercation between A. and C., C. stabs A. with a dagger drawn from his pocket, this was held to be a case not within the statute. East, P. C. c. v. § 29.

the general precept to Noah[p], that "whoso sheddeth man's "blood, by man shall his blood be shed,") are very emphatical in prohibiting the pardon of murderers[q]. "Moreover ye "shall take no satisfaction for the life of a murderer, which is "guilty of death, but he shall be surely put to death; for the "land cannot be cleansed of the blood that is shed therein, "but by the blood of him that shed it." And therefore our law has provided one course of prosecution, (that by appeal, of which hereafter,) wherein the king himself is excluded the power of pardoning murder; so that, were the king of England so inclined, he could not imitate that Polish monarch mentioned by Puffendorf[r]: who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris rigorem moder-* "*antes, &c.*" But let us now consider the definition of this great offence.

The name of *murder* (as a crime) was antiently applied only to the secret killing of another[s]; (which the word *moërda* [195] signifies in the Teutonic language[t];) and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam perpe-* "*tratur*[u]:" for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated *murdrum.*[w] This was an antient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder[x]: and, according to Bracton[y], was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the

[p] Gen. ix. 6.

[q] Numb. xxxv. 31. 33.

[r] de j. n. & g. l. 8. c. 3.

[s] *Dial. de Scacch. l.* 1. c. 10.

[t] Stiernh. *de jure Sueon. l.* 3. *c.* 3. The word *murdre* in our old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. I. "*je riens ne celerai, ne suf-* "*ferai estre celé ne murdré:*" which is thus translated in Fleta, *l.* 1. *c.* 18. § 4. "*Nullam veritatem celabo, nec celari* "*permittam nec murdrari.*" And the words "*pur murdre le droit*" in the articles of that statute, are rendered in Fleta, *ibid.* § 8. "*pro jure alicujus mur-* "*drando.*"

[u] Glanv. *l.* 14. *c.* 3.

[w] Bract. *l.* 3. *tr.* 2. *c.* 15. § 7. Stat. Marl. *c.* 26. Fost. 281.

[x] Stiernh. *l.* 3. *c.* 4.

[y] *l.* 3. *tr.* 2. *c.* 15.

conqueror, for the like security to his own Normans.[z] And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie*[a],) the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III. st. 1. c. 4. we must now (as is observed by Staundforde[b]) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

MURDER is therefore now thus defined or rather described by sir Edward Coke[c]; "when a person of sound memory and "discretion, unlawfully killeth any reasonable creature in "being, and under the king's peace, with malice aforethought, "either express or implied. The best way of examining the nature of this crime will be by considering the several branches of this definition. (19)

FIRST, it must be committed by a *person of sound memory and discretion:* for lunatics or infants, as was formerly observed, are incapable of committing any crime: unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

NEXT, it happens when a person of such sound discretion *unlawfully killeth.* The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemesnor, though formerly it was held to be murder[d].(20) The killing may be by poisoning, striking, [196]

[z] 1 Hal. P. C. 447.
[a] Bract. *ubi supr.*
[b] P. C. *l.* 1. *c.* 10.
[c] 3 Inst. 47.
[d] 1 Hal. P. C. 425.

(19) The description at length is, "When a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum naturâ* under the king's peace, with malice forethought, either expressed by the party or implied by law, so as the party wounded or hurt, &c. die of the wound or hurt, &c. within a year and a day after the same."

(20) Although a simple assault with intent to murder still remains only a misdemesnor, yet the legislature has interfered in several instances to make

starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstance, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial[e]. Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought[f]. And therefore by the statute 22 Hen. VIII. c. 9. it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death: but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was also, by the antient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past[g]: I mean by bearing false witness against another, with

[e] 3 Inst. 135. 2 Hal. P. C. 185.

[f] 3 Inst. 48.

[g] Fost. 132. In the case of Macdaniel and Berry, reported by sir Michael Foster, though the then attorney general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution.

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make attempts to murder by certain means capital felonies. Several of these will be found noticed in the text in their proper places; but the most important statute on the subject was passed since the death of the author, the 43 G. 3. c. 58., commonly called Lord Ellenborough's Act. This punishes with death in principals, counsellors, aiders and abettors, the maliciously shooting at any of his majesty's subjects; the presenting, pointing, or levelling any kind of loaded fire-arms at any one; the attempting in any way to discharge the same at any one; stabbing or cutting any one, with intent in so doing any of these things to murder, rob, maim, disfigure, disable, or do any other grievous bodily harm to such person, or with intent to obstruct, or resist the lawful apprehension or detainer of the person so stabbing or cutting, or of any accomplice for any offence for which he or they may be liable by law to be apprehended, and the maliciously administering any deadly poison or other noxious thing, with intent to murder, or cause the miscarriage of any woman then quick with child. The same statute provides, however, that if the shooting at, levelling, or attempting to discharge the loaded fire-arms, or the stabbing or cutting, were done under such circumstances as that, if death had ensued, the

an express premeditated design to take away his life, so as the innocent person be condemned and executed.[h] The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor: "*peculiari poena judicem puniunt; "peculiari testes, quorum fides judicem seduxit; peculiari denique "et maxima auctorem, ut homicidam.*"[i] And, among the Romans, the *lex Cornelia, de sicariis*, punished the false witness with death, as being guilty of a species of assassination.[k] And there is no doubt but this is equally murder in *foro conscientiae* as killing with a sword; though the modern law (to [197] avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. (21) If a man, however, does such an act of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died[l]; of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it[m]; and of the parish-officers, who shifted a child from parish to parish, till it died for want of care and sustenance.[n] So too, if a man hath a beast that is used to do mischief; and he knowing it, *suffers* it to go abroad, and it kills a man; even this is manslaughter in the owner: but if he had purposely *turned it loose*, though barely to frighten people, and make what is called sport, it is with us (as in the Jewish law (22)) the same would not in law have amounted to murder, then the party charged shall be acquitted.

The 1 G. 4. c. 90. has provided, that all offences mentioned in this last statute, which shall be committed on the high seas, out of the body of any county, shall be offences of the same nature respectively, and liable to the same punishments, as if committed on land in England or Ireland, and shall be enquired of as treasons, felonies, &c. under 28 H. 8. c. 15. are to be. See post, p. 268.

(21) See p. 138. n. 16.

(22) Exod. xxi. v. 28, 29.

[h] Mirror. c. 1. § 9. Britt. c. 52. Bract. *l.* 3. *c.* 4.

[i] Stiernh. *de jure Goth. l.* 3. *c.* 3.

[k] *Ff.* 48. 8. 1.

[l] 1 Hawk. P. C. c. 31. § 4, 5, 6.

[m] 1 Hal. P. C. 432.

[n] Palm. 545.

as much murder, as if he had incited a bear or dog to worry them.[o] If a physician or surgeon gives his patient a potion or plaister to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance[p]: but it hath been holden, that if it be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least.[q] Yet sir Matthew Hale very justly questions the law of this determination.[r] In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first.[s]

[198] Farther; the person killed must be "*a reasonable creature in being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war.[t] To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.[u] But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I. c. 27. that if any woman be delivered of a child which if born alive should by law be a bastard; and endeavours privately to conceal its death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead. This law, which savours pretty strongly of severity, in making the concealment

[o] Palm. 431.
[p] Mirr. c. 4. § 16. See Vol III. pag. 122.
[q] Britt. c. 5. 4 Inst. 251.
[r] 1 Hal. P. C. 430.
[s] 1 Hawk. P. C c. 31. § 9.
[t] 3 Inst. 50. 1 Hal. P. C. 433.
[u] 3 Inst. 50. 1 Hawk. P. C. c. 31. § 16.; but see 1 Hal. P. C. 433.

of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French[v]: but I apprehend it has of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child, whose death is concealed, was therefore killed by it's parent) is admitted to convict the prisoner. (23)

LASTLY, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved,

[v] See Barrington on the statutes, 549, 4th ed.

[w] Foster, 256.

(23) The statute last cited (43 G. 3. c. 58.) has materially altered the law in this respect. The provisions of the 21 Jac. 1. c. 27. are repealed, and the trials of women charged with the murder of their issue, which, being born alive, would by law be bastard, now proceed by the like rules of evidence and presumption as all other trials for murder. At the same time, where the jury acquit the prisoner of the murder, they may find, if it so appears in evidence that the child if born alive would have been a bastard, and that the mother endeavoured to conceal the birth; upon which finding the court may sentence the mother to two years' imprisonment.

The same statute, as we have seen, makes it a capital felony to administer any poison or noxious thing with intent to cause the miscarriage of any woman then quick with child; in a subsequent section, it provides for the case where the woman is not proved to be quick with child, and makes the offence then a clergyable felony, to be punished by fine and imprisonment, whipping public or private, or transportation for a term not exceeding fourteen years.

By the present French law, the offence of procuring abortion, whether with or without the pregnant woman's consent, is punished by reclusion; and the woman suffers the same punishment where she has consented to the crime; but medical men and chemists are punished by hard labour for term of years, if they are convicted of having disclosed or administered the means of procuring abortion, and abortion has followed in consequence. The law seems to make no distinction between the child being quick or not, a distinction which perhaps in fact would be very difficult to establish. Code Penal, liv. iii. tit. 2. s. 317.

and malignant heart[w]; *un disposition à faire un male chose*[x],
[199] and it may be either *express*, or *implied* in law. Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm[y]. This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also[z]. Yet it requires such a degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who hath given the insult. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent
[200] to a deliberate act of slaughter[a]. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shews him to be an enemy to all mankind in

[y] 1 Hal. P.C. 451.
[z] 1 Hawk. P.C. c. 31. § 21.
[a] 1 Hal. P.C. 454. 473, 474.
[x] 2 Roll. Rep. 461.

general; as going deliberately, and with an intent to do mischief[b], upon a horse used to strike, or coolly discharging a gun, among a multitude of people[c]. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia praecogitata*, or evil intended beforehand[d].

Also in many cases where no malice is expressed, the law will imply it: as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved[e]. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another[f]. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder[g]. In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder[h]. And if one intends to do another felony, and undesignedly kills a man, this is also murder[i]. Thus, if one [201] shoots at A and misses *him*, but kills B, this is murder; be-

[b] Lord Raym. 143.
[c] 1 Hawk. P.C. c.29. §.12.
[d] *Ibid.* c.29. § 10.
[e] 1 Hal. P.C. 455.
[f] 1 Hawk. P.C. c.31. § 33. 1 Hal. P.C. 455, 456.
[g] Fost. 291.
[h] 1 Hal. P.C. 457. Fost. 308, &c.
[i] 1 Hal. P.C. 465.

cause of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder[j]. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman; this is murder in the person who gave it[k]. It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence[l].

The punishment of murder, and that of manslaughter, were formerly one and the same; both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime[m]. But now, by several statutes[n], the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place
202] where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. This, being quite contrary to

[j] 1 Hal. P. C. 466.
[k] *Ibid.* 429.
[l] Fost. 255.
[m] 1 Hal. P. C. 450
[n] 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 4 & 5 Ph. & M. c. 4.

the express command of the mosaical law [o], seems to have been borrowed from the civil law: which besides the terror of the example, gives also another reason for this practice, *viz.* that it is a comfortable sight to the relations and friends of the deceased [p]. But now in England, it is enacted by statute 25 Geo. II. c. 37. that the judge, before whom any person is found guilty of wilful murder shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall, in passing sentence, direct him to be executed on the next day but one, (unless the same shall be Sunday, and then on the Monday following,) and that his body be delivered to the surgeons to be dissected and anatomized [q]: and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. And, during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act.

By the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea [r]. Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity [s]. And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be [supposititious or] bastards. (24) And, upon some such reason as this, we must account for the omission of an exemplary punishment [203]

[o] "His body shall not remain all "night upon the tree, but thou shalt in "any wise bury him that day, for he "that is hanged is accursed of God, "that thy land be not defiled." Deut. xxi. 23.

[p] "*Famosos latrones, in his locis, ubi* "*grassati sunt, furca figendos placuit;* "*ut, et conspectu deterreantur alii, et* "*solatio sit cognatis interemptorum* "*eodem loco poena reddita, in quo la-* "*trones homicidia fecissent.*" *Ff.* 48. 19. 28. § 15.

[q] Post. 107.

[r] *Ff.* 41. 9. 9.

[s] Cic. *pro S. Roscio*, § 25.

(24) See Clio. c. 137.

for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent [t]. (25)

For, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offence, no less than a species of treason, called *parva proditio*, or *petit treason*: which however is nothing else but an aggravated degree of murder [v]; although on account of the violation of private allegiance, it is stigmatized as an inferior species of treason [u]. And thus, in the antient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign [w].

Petit treason, according to the statute 25 Edw. III. c. 2., may happen three ways; by a servant killing his master (26), a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master, whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason: for the traiterous intention was hatched while the relation subsisted between them; and this is only an execution of that intention [x]. So if a wife be divorced *a*

[t] 1 Hal. P. C. 380.

[v] Foster, 107. 324. 336.

[u] See pag. 75.

[w] "*Omnium gravissima censetur vis, facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores, (et vice versa,) servis in dominos, aut etiam ab homine in semet ipsum.*" Stiernh. *de jure Goth. l.* 3. c. 3.

[x] 1 Hawk. P. C. c. 32. § 4. 1 Hal. P. C. 380.

(25) By the French law, parricide includes the murder of adoptive as well as natural parents, and all legitimate relatives in the lineal ascent; no circumstances are allowed to reduce it to excusable homicide, and its punishment is attended with certain peculiar solemnities. The prisoner is brought to the place of execution in his under-garment, barefooted, and his head covered with a black veil; he stands exposed on a scaffold, while an officer reads aloud to the people his sentence: his right hand is then cut off, and he is immediately executed. Code Penal, liv. i. c. 1. s. 13. liv. iii. tit. 2. s. 299. 323.

(26) Which term includes his mistress, if there be no master, and also his master's wife. East's P. C. c. v. s. 99.

mensa et thoro, still the *vinculum matrimonii* subsists; and if she kills such divorced husband, she is a traiteress [y]. And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason [z]. As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in its most odious degree: except that the trial shall [204] be as in cases of high treason, before the improvements therein made by the statutes of William III. [a] But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder [b]: and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in its punishment.

THE punishment of petit treason, in a man, is to be drawn and hanged, and in a woman to be drawn and burnt [c]: the idea of which latter punishment seems to have been handed down to us by the laws of the antient Druids, which condemned a woman to be burnt for murdering her husband [d]; and it is now the usual punishment for all sorts of treasons committed by those of the female sex [e]. (27) Persons guilty of petit treason were first debarred the benefit of clergy, by statute 12 Hen. VII. c. 7. which has been since extended to their aiders, abettors, and counsellors, by statues 23 Hen. VIII. c. 1. and 4 & 5 P. & M. c. 4.

[y] 1 Hal. P. C. 381.
[z] *Ibid.*
[a] Fost. 337.
[b] Foster, 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.
[c] 1 Hal. P. C. 382. 3 Inst. 211.
[d] Cæsar *de bell. Gall. l.* 6. *c.* 19.
[e] See pag. 93.

(27) By the 30 G. 3. c. 48. the punishment of women for petit-treason is altered; they are now to be drawn to the place of execution, and there hanged by the neck. They are also made subject to the further penalties and provisions of the 25 G. 2. c. 37. (See ante, p. 202.)

CHAPTER THE FIFTEENTH.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

HAVING in the preceding chapter considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to enquire into such other crimes and misdemesnors, as more peculiarly affect the security of his person, while living.

Of these some are felonious, and in their nature capital; others are simple misdemesnors, and punishable with a lighter animadversion. Of the felonies the first is that of *mayhem*.

I. Mayhem, *mayhemium*, was in part considered in the preceding volume [a], as a civil injury: but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary [b]. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

[a] See Vol. III. pag. 121. [b] Brit. l. 1. c. 25. 1 Hawk. P. C. c. 55. § 1.

By the antient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro* [c]: which is still the law in Sweden [d]. But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn [e], is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment [f]; unless perhaps the offence of mayhem by castration, which all our old writers held to be felony: "*et sequitur* "*aliquando poena capitalis, aliquando perpetuum exilium, cum* "*omnium bonorum ademptione* [g]." And this, although the mayhem was committed upon the highest provocation [h]. (1)

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Hen. IV. c. 5. to remedy a mischief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his *tongue*, or putting out his *eyes*, to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as sir Edward Coke [i] explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute 37 Hen. VIII. c. 6. which directs, that if a man shall malici-

[c] 3 Inst. 118.—*Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, entiel case perdra le feme la une meyn par jugement, come le membre dount ele avera trespasse.* (Brit. c. 25.)

[d] Stiernhook *de jure Sueon. l.* 3. *t.* 3.

[e] See pag. 12.

[f] 1 Hawk. P.C. c. 55. § 3.

[g] Bract. l. 3. tr. 2. c. 23.

[h] Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the third's time, (*Claus.* 13 *Hen. III.* m. 9.) by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

[i] 3 Inst. 62.

(1) By the French law, this species of mayhem is punished with hard labour for life, or by death, where the party so maimed dies in consequence within forty days. If, however, the act of violence has been provoked by and immediately follows upon some gross outrage to chastity and modesty, it sinks down to an excusable wounding or homicide, as the case may be, and is then punished with an imprisonment of from one to five years. Code Penal, l. iii. t. 2. s. 316. 325, 326.

ously and unlawfully cut off the *ear* of any of the king's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 10*l.* by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II. c. 1., called the Coventry act; being occasioned by an assault on sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or to disfigure him;* such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy [k]. (2)

[k] On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare intent to murder is no felony; but to disfigure with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder; and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this statute; and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials, VI. 212.)

(2) The words "malice aforethought" in this statute do not require a malice directed against any particular individual, or the individual who suffers by it. If the malice be conceived against all who may happen to fall within the scope of the perpetrator's design, the particular mischief done will connect itself with the general malignant intent, and the statute will be satisfied. So again, if the blow be intended to maim A, and by accident maim B, the party is equally within its reach. This is upon the general principles of construction in the criminal law.

With regard to the words "lying in wait," it is not necessary that the party should have planted himself in ambush, and effected the mischief by rushing

THUS much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any person in any dwelling-house or other place; an offence, of which the probable consequence may be either killing or maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by statute [208] 9 Geo. I. c. 22., and thereupon one Arnold was convicted in 1723 for shooting at lord Onslow; but, being half a madman, was never executed, but confined in prison, where he died about thirty years after. (3)

II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their *forcible abduction and marriage;* which is vulgarly called *stealing an heiress.* For by statute 3 Hen. VII. c. 2., it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such women, shall be deemed principal felons: and by statute 39 Eliz. c. 9., the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessories *before* the fact. (4)

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rushing from it; it is enough if there be a formed intention to maim, and a convenient opportunity sought and deliberately taken of doing the injury.

Lastly, the word "slit" will be satisfied by a transverse, as well as a perpendicular cut of the nose; any division of the flesh or gristle of the nose, in whatever form or direction, is sufficient. East's Pl. C. c. vii. s. 3.

(3) The same construction has prevailed with regard to this statute, which is specially enacted relative to the 43 G. 3. c. 58. (see ante, p. 196. n. 20.) To bring a case within it, there must have been such malice that if death had ensued it would have been murder. And though it is not necessary that any evil consequence should actually ensue from the shooting, yet there must have been a possibility of it; the gun or other instrument must have been loaded, and it must have been levelled at the party; so that where the prisoner imagined the party was gone in one direction, and fired accordingly, whereas in truth he had escaped in the opposite, the court directed an acquittal. East's P. C. c. viii. s. 6.

(4) This is repealed by the 1 G. 4. c. 115., and the punishment of transportation for life, or for term of years not less than seven, or of imprisonment

In the construction of this statute it hath been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute [l]. 2. In order to shew this, it must appear that the woman has substance either real or personal, or is an heir apparent [m]. 3. It must appear that she was taken away against her will. 4. It must also appear, that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will [n]: and so *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her
[209] will, as if she never had given any consent at all; for till the force was put upon her, she was in her own power [o]. It is held that a woman, thus taken away and married, may be sworn and give evidence against the offender, though he is her husband *de facto*; contrary to the general rule of law; because he is no husband *de jure*, in case the actual marriage was also against her will [p]. In cases indeed where the actual marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, sir Matthew Hale seems to question how far her evidence should be allowed: but other authorities [q] seem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him. (5)

[l] 1 Hawk. P. C. c. 41. § 5.
[m] 1 Hal. P. C. 660. 1 Hawk. P. C. c. 41. § 4.
[n] 1 Hal. P. C. 660.
[o] 1 Hawk. P. C. c. 41. § 7.
[p] 1 Hal. P. C. 661.
[q] Cro. Car. 488. 3 Keb. 193. State Trials, V. 455.

ment with or without hard labour for any term not exceeding seven years, substituted.

(5) It would be safer, perhaps, to put the competency of the woman as a witness against her husband on the principle now settled, that this is a personal injury committed by the husband against her, and that in all such cases the injured party is an admissible witness.

Upon

An inferior degree of the same kind of offence, but not attended with force, is punished by the statute 4 & 5 Ph. & Mar. c. 8. which enacts that if any person, above the age of fourteen, unlawfully shall convey or *take away any woman child unmarried*, (which is held [r] to extend to bastards as well as to legitimate children,) within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices; and if he deflowers such maid or woman child, or without the consent of parents, contracts matrimony with her, *he* shall be imprisoned five years, or fined at the discretion of the justices, and *she* shall forfeit all her lands to her next of kin, during the life of her said husband. So that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this act, besides punishing the seducer, wisely removed the temptation. But this latter part of the act is now rendered almost useless, by provisions of a very different kind, which make the mar- [210]
riage totally void [s], in the statute 26 Geo. II. c. 33. (6)

III. A third offence, against the female part also of his majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, or the carnal knowledge of a woman forcibly and

[r] Stra. 1162. [s] See Vol. I. p. 437, &c.

Upon the general principle that the complete crime must be proved in the county in which the trial takes place, it is settled that if a woman be forcibly taken in one county, and afterwards go voluntarily into another county, and be there married or defiled with her own consent, the fact is indictable in neither, for in neither is there both a forcible taking and subsequent marriage or defilement. But if the force continued upon her at all into the county in which she was married or defiled, the offence will be complete, and triable there. 1 East's P.C. c. xi. s. 3. 1 Russell. C.L. 821., where there is a full report of the case of the Gordons, which turned on this point.

(6) By the 4 G. 4. c. 76. (the present marriage act), such a marriage would not be void; but means are pointed out by way of information in the courts of chancery or exchequer to secure the property under an order of those courts, for the benefit of the innocent party or the issue of the marriage; and all agreements or settlements entered into by the parties in relation to such marriage, which are contrary to such order, are made absolutely void.

against her will. This, by the Jewish law[t], was punished with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the mosaic law.

The civil law[u] punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke: and also the present offence of forcibly dishonouring them; either of which without the other, is in that law sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive* "*volentibus, sive nolentibus mulieribus, tale facinus fuerit per-* "*petratum.*" And this, in order to take away from women every opportunity of offending in this way, whom the Roman law supposes never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si enim ipsi raptores metu, vel atrocitate poenae, ab hujusmodi* "*facinore se temperaverint, nulli mulieri, sive volenti, sive* "*nolenti, peccandi locus relinquetur; quia hoc ipsum* velle *mu-* "*lierum, ab insidiis nequissimi hominis, qui meditatur rapinam,* [211] "*inducitur. Nisi etenim eam solicitaverit, nisi odiosis artibus* "*circumvenerit, non faciet eam velle in tantum dedecus sese* "*prodere.*" But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

Rape was punished by the Saxon laws, particularly those of king Athelstan[w] with death: which was also agreeable to the old Gothic or Scandinavian constitution[x]. But this was

[t] Deut. xxii. 25.
[u] *Cod.* 9. *tit.* 13.
[w] Bracton, *l.* 3. *c.* 28.
[x] Stiernh. *de jure Sueon. l.* 3 *c.* 2.

afterwards thought too hard: and in its stead another severe, but not capital punishment was inflicted by William the Conqueror; *viz.* castration, and loss of eyes [y]; which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law, (and, it seems, still continues to be so in appeals of rape [z],) that the woman should immediately after, "*dum recens "fuerit maleficium,*" go to the next town, and there make discovery to some credible persons of the injury she has suffered: and afterward should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage [a]. This seems to correspond in some degree with the laws of Scotland and Arragon [b], which requires that complaint must be made within twenty-four hours: though afterwards by statute Westm. 1. c. 13. the time of limitation in England was extended to forty days. At present there is no time of limitation fixed: for, as it is usually now punished by indictment at the suit of the king, the maxim of law takes place, that *nullum tempus occurrit regi:* but the jury will rarely give credit to a stale complaint. During the former period also it was held for law [c], that the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the exchange, but not otherwise.

In the 3 Edw. I. by the statute Westm. 1. c. 13. the punishment of rape was much mitigated: the offence itself of ravishing a damsel within age, (that is, *twelve* years old,) either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days, and subjecting the offender only to two years' imprisonment, and a fine at the king's will. But this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I., found necessary to [212]

[y] *LL. Gull. Conqu. c.* 19. (7)
[z] 1 Hal. P. C. 632.
[a] Glan. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.
[b] Barrington, 142.
[c] Glan. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.

(7) The expression in the original is simply *forfait ad les membres, foris facit membra sua.* Nothing is said of the eyes. Wilk. 222.

make the offence of forcible rape felony by statute West. 2. c. 34. And by statute 18 Eliz. c. 7. it is made felony without benefit of clergy; as is also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion. Sir Matthew Hale is indeed of opinion that such profligate actions committed on an infant under the age of *twelve* years, the age of female discretion by the common law, either with or without consent, amount to rape and felony: as well since as before the statute of queen Elizabeth [d]: but that law has in general been held only to extend to infants under *ten:* though it should seem that damsels between *ten* and *twelve* are still under the protection of the statute Westm. 1. the law with respect to their seduction not having been altered by either of the subsequent statutes.

A MALE infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it. For though in other felonies *malitia supplet aetatem*, as has in some cases been shewn; yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind [e].

THE civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind [f]: not allowing
[213] any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life [g]: for, as Bracton well observes [h], "*etsi meretrix fuerit ante, tunc non fuit meretrix, cum nequitiae ejus reclamando consentire noluit.*" (8)

[d] 1 Hal. P. C. 631.
[e] *Ibid.*
[f] *Cod.* 9. 9. 22. *Ff.* 47. 2. 39.
[g] 1 Hal. P. C. 629. 1 Hawk. P. C. c. 41. § 7.
[h] *l.* 3. c. 27.

(8) According to Bracton, however, the old law made a difference in the punishment

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall therefore merely add upon this head a few remarks from sir Matthew Hale; with regard to the competency and credibility of witnesses; which may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it: these and the like are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry: these and the like circumstances [214] carry a strong, but not conclusive, presumption that her testimony is false or feigned.

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punishment in proportion to the character of the party ravished. After stating generally the punishment, as mentioned in the text, he goes on thus: *Non autem sequitur hujusmodi pœna de quâlibet fœminâ, licet vi opprimatur. Sequitur tamen alia gravis et gravior, secundum quod fuerit nupta, vel vidua honestè vivens, sanctimonialis, vel alia matrona. Item concubina legittima vel alia quæstum faciens sine delectu quidem personarum, quas quidem omnes debet rex tueri propter pacem suam, sed non erit de quâlibet par pœna. Olim quidem corruptores virginitatis et castitatis suspendebantur, & eorum fautores, cum nec tales ab homicidii crimine vacui essent, et maximè cum virginitas et castitas restitui non possunt; modernis tamen temporibus aliter observatur, quod pro corruptione virginis amittantur membra, ut prædictum est, et de aliis sequitur alia gravis pœna corporalis, sed tamen sine amissione vitæ et membrorum.* Bract. L. iii. c. 27. f. 147.

MOREOVER, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by sir Matthew Hale[1] that she ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled, [Brazier's case, before the twelve judges, P. 19 Geo. III.] that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. (9) Yet, where the evidence of children is admitted, it is much to be wished, in order to

[1] 1 Hal. P.C. 634.

(9) These are now the established rules in all cases, criminal as well as civil, and whether the prisoner is tried for a capital offence, or for one of an inferior nature. When the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary for the purposes of justice to put off the trial of the prisoner, directing that the child in the mean time should be properly instructed. Phill. L. of Evidence, 1. p. 20. 5th ed.

Sir M. Hale reasons upon it as the established practice, with which he found no fault, to hear upon oath the statement by the mother or other relations of the child's complaint to them recently after the fact; and reasons correctly, that it is better for the court to hear that from the child herself, than to receive it at second hand from them. The present practice is undoubtedly more wise, because the inconvenience of occasionally suffering a ruffian to escape unpunished is not to be weighed against the preservation of the grand principle that no evidence shall be received but upon oath. Yet it may well be questioned, whether the purposes of justice are upon the whole answered by the practice of postponing the trial for the instruction of the witness; in the interval between two circuits she stands a chance of being instructed in more senses than one, and even if surrounded by the best-intentioned persons, the memory of a child so young or so ignorant as not to know the nature of an oath, is too precarious a thing to place the life of a man at its disposal, after an interval, perhaps, of twelve months from the period of which the witness is to speak. Brazier's case is to be found reported in 1 Leach. Cr. C. 199. 1 East, Pl. C. c. x. s. 5.

render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

[215]

"IT is true, says this learned judge[k], that rape is a most "detestable crime, and therefore ought severely and impar- "tially to be punished with death; but it must be remembered "that it is an accusation easily to be made, and hard to be "proved, and harder to be defended by the party accused, "though never so innocent." He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation; and concludes thus: "I mention these instances, that we may be the more "cautious upon trials of offences of this nature, wherein the "court and jury may with so much ease be imposed upon, "without great care and vigilance; the heinousness of the "offence many times transporting the judge and jury with so "much indignation, that they are overhastily carried to the "conviction of the person accused thereof, by the confident "testimony sometimes of malicious and false witnesses."

IV. WHAT has been here observed, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity: the infamous *crime against nature*, committed either with man or beast. A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

[k] 1 Hal. P.C. 635.

I will not act so disagreeable a part to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos* "*non nominandum*[k]." (10) A taciturnity observed likewise by the edict of Constantius and Constans[l]; "*ubi scelus est id,* "*quod non proficit scire, jubemus insurgere leges, armari jura* [216] "*gladio ultore, ut exquisitis poenis subdantur infames, qui sunt,* "*vel qui futuri sunt rei.*" Which leads me to add a word concerning it's punishment.

This the voice of nature and of reason, and the express law of God[m], determined to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our antient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death[n]; though Fleta[o] says, they should be buried alive; either of which punishments was indifferently used for this crime among the antient Goths.[p] But now the general punishment of all felonies is the same, namely, by hanging; and this offence (being in the times of popery only subject to ecclesiastical censures) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6. revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that if both are arrived at years of discretion, *agentes et consentientes pari poena plectantur.*[q]

These are all the felonious offences more immediately against the personal security of the subject. The inferior

[k] See in *Rot. Parl.* 50 Edw. III. n. 58. a complaint, that a Lombard did commit the sin, "that was not to be "named." (12 Rep. 37.)

[l] *Cod.* 9. 9. 31.

[m] Levit. xx. 13. 15.

[n] Britt. *c.* 9.

[o] *l.* 1. *c.* 37.

[p] Stiern. *de jure Goth. l.* 3. *c.* 2.

[q] 3 Inst. 59.

(10) The next period of the indictment always names the offence.

offences, or misdemesnors, that fall under this head, are *assaults, batteries, wounding, false imprisonment,* and *kidnapping.*

V. VI. VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these Commentaries[r]; when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design.[s] As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the [217] two last cases, indictments are much more usual than for the absolute perpetration of the facts themselves, on account of the difficulty of proof: or, when both parties are consenting to an unnatural attempt, it is usual not to charge any *assault;* but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer, the commission of the abominable crime before mentioned. And, in all these cases, besides heavy fine and imprisonment, it is usual to award judgment of the pillory. (11)

There is also one species of battery, more atrocious and penal than the rest, which is the beating of a clerk in orders, or clergyman; on account of the respect and reverence due to his sacred character, as the minister and ambassador of peace. Accordingly it is enacted by the statute called *articuli cleri,* 9 Edw. II. c. 3. that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king; that is, by indictment in the king's courts; and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which if the

[r] 1 See Vol. III. pag. 120. [s] Hawk. P. C. c. 25. § 3.

(11) The punishment of the pillory could not now be imposed for this offence, being, as I have often before noticed, abolished by 56 G. 3. c. 138., except in case of perjury or subornation of perjury.

offender will redeem by money, to be given to the bishop, or the party aggrieved, it may be sued for before the bishop; whereas otherwise to sue in any spiritual court, for civil damages for the battery, falls within the danger of *praemunire*.[t] But suits are, and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance.[u] So that upon the whole it appears, that a person guilty of such brutal behaviour to a clergyman, is subject to three kinds of prosecution, all of which may be pursued for one and the same offence: an indictment, for the breach of the king's peace by such assault and battery; a civil action, for the special damage sustained by the party injured; and a suit
[218] in the ecclesiastical court, first, *pro correctione et salute animae*, by *enjoining* penance, and then again for such sum of money as shall be agreed on for *taking off* the penance enjoined; it being usual in those courts to exchange their spiritual censures for a round compensation in money[v]; perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animae*.

VIII. The two remaining crimes and offences, against the persons of his majesty's subjects, are infringements of their natural liberty: concerning the first of which, *false imprisonment*, it's nature and incidents, I must content myself with referring the student to what was observed in the preceding volume[w], when we considered it as a mere civil injury. But besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of it's members, and for the infringement of the good order of society. We have seen before[x], that the most atrocious degree of this offence, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *praemunire*, and incapacity to hold any office, without any possibility of pardon.[y] And we may also add,

[t] 2 Inst. 492. 620.
[u] *Artic. Cler. Edw. II. c.* 4. F.N.B. 53.
[v] 2 Roll. Rep. 384.
[w] See Vol. III. pag. 127.
[x] See pag. 116.
[y] Stat. 31 Car. II. *c.* 2.

that by statute 43 Eliz. c. 13. to carry any one by force out of the four northern counties, or imprison him within the same, in order to ransom him or make spoil of his person or goods, is felony without benefit of clergy, in the principals and all accessories before the fact. (12) Inferior degrees of the same offence of false imprisonment, are also punishable by indictment, (like assaults and batteries,) and the delinquent may be fined and imprisoned.[z] And indeed[a] there can be no doubt, but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemesnors whatsoever of a notoriously evil example, may be indicted at the suit of the king.

IX. The other remaining offence, that of *kidnapping*, being [219] the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another, was capital by the Jewish law. "He that stealeth a man, "and selleth him, or if he be found in his hand, he shall surely be put to death[b]." So likewise in the civil law, the offence of spiriting away and stealing men and children, which was called *plagium*, and the offenders *plagiarii*, was punished with death.[c] This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory.[d] And also the statute 11 & 12 W. III. c. 7., though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months' imprison-

[z] West. Symbol. part. 2. pag. 92.
[a] 2 Hawk. P.C. c. 25. § 4.
[b] Exod. xxi. 16.
[c] *Ff.* 48. 15. 1.
[d] Raym. 474. 2 Show. 221. Skin. 47. Comb. 10.

(12) It is rather remarkable that this obsolete statute should still remain unrepealed.

ment. (13) And thus much for offences that more immediately affect the *persons* of individuals.

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(13) The 58 G.3. c.38. reciting that no mode of prosecuting this offence is provided by the act of W.3. enacts, that all offences against it may be prosecuted by indictment, or information in the court of king's bench at Westminster; and the court may issue commissions for the examination of witnesses abroad, whose depositions shall be received as evidence on the trial.

The 54 G.3. c.101. has provided against the offence of child-stealing, and makes it felony punishable as grand larceny, by force or fraud to take or entice away any child under the age of ten years, with intent to deprive the parents or any one having lawful charge of the child, of the possession of such child; or with intent to steal any article of ornament, value or use upon or about the child; or knowingly to receive and harbour such child so taken and enticed away.

CHAPTER THE SIXTEENTH.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

THE only two offences, that more immediately affect the *habitations* of individuals or private subjects, are those of *arson* and *burglary*.

1. ARSON, *ab ardendo*, is the malicious and wilful burning the house or out-house of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft: because first, it is an offence against that right of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which too it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law[a] punishes with death such as maliciously set fire to houses in towns, and contiguous to others; but is more merciful to such as only fire a cottage, or house, standing, by itself.

OUR English law also distinguishes with much accuracy [221] upon this crime. And therefore we will enquire, first, what

[a] *Ff.* 48. 19. 28. § 12.

is such a house as may be the subject of this offence: next, wherein the offence itself consists, or what amounts to a burning of such house; and lastly, how the offence is punished.

1. Not only the bare dwelling-house, but all out-houses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson [b]. And this by the common law; which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house [c]. The burning of a stack of corn was antiently likewise accounted arson [d]. And indeed all the niceties and distinctions which we meet with in our books, concerning what shall, or shall not, amount to arson, seem now to be taken away by a variety of statutes; which will be mentioned in the next chapter, and have made the punishment of wilful burning equally extensive as the mischief. The offence of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. [e] For by the common law no intention to commit a felony amounts to the same crime; though it does, in some cases, by particular statutes. However such wilful firing one's own house, *in a town*, is a high misdemesnor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour [f] (14).

[b] 1 Hal. P.C. 567.
[c] 3 Inst. 67.
[d] 1 Hawk. P.C. c. 39. § 8.
[e] Cro. Car. 377. 1 Jon. 351.
[f] 1 Hal. P.C. 568. 1 Hawk. P.C. c. 39. § 15.

(14) The 43 G. 3. c. 58., which I have already had occasion to cite several times, makes it a capital felony wilfully and maliciously to set fire to any house, barn, granary, hop-oast, outhouse, mill, warehouse, or shop, whether the same shall then be in the party's own possession or not, if it be done with intent to injure or defraud his majesty, any of his subjects, or any body corporate. The principal object of this enactment was to comprise the cases of persons burning houses, mills, &c., of which they are tenants or owners, to the injury of their landlords, or to defraud the insurers. But it is not necessary to prove any distinct malice, or intent to defraud, beyond that which the law necessarily inplies from the act of deliberate arson.

This

And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for during the lease, the house is the property of the tenant.[g]

2. As to what shall be said to be a *burning*, so as to amount [222] to arson, a bare intent, or attempt to do it, by actually setting fire to an house, unless it absolutely *burns*, does not fall within the description of *incendit et combussit*; which were words necessary, in the days of law-latin, to all indictments of this sort. But the burning and consuming of any part is sufficient; though the fire be afterwards extinguished[h]. Also it must be a *malicious* burning: otherwise it is only a trespass: and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this sir Matthew Hale determines not to be felony, contrary to the opinion of former writers.[i] But by statute 6 Ann. c. 31. any servant negligently setting fire to a house or out-houses, shall forfeit 100*l.* or be sent to the house of correction for eighteen months; in the same manner as the Roman law directed, "*eos, qui negligenter ignes apud se habuerint, fustibus vel flagellis caedi*"[k]. (15)

3. The *punishment* of arson was death by our antient Saxon laws[l]. And in the reign of Edward the first, this sentence

[g] Fost. 115.
[h] 1 Hawk. P. C. c. 39. § 16, 17.
[i] 1 Hal. P. C. 569.
[k] *Ff.* 1. 15. 4.
[l] *LL. Inae.* c. 7. (16)

This is the application of the general principle of the criminal law, that a man must be presumed to intend the necessary consequences of his acts; and in pursuance thereof, a case was held to be within the statute in which the witnesses for the prosecution stated that the prisoner "was an harmless inoffensive man, that there never had been any quarrel or disagreement between him and his masters (the owners of the mill set fire to), or any of the clerks, and that they were not aware of any motive which could have induced him to commit the act." Farrington's case, 2 Russell, C. L. 1675.

(15) This statute is repealed, but a similar provision is to be found in 14 G. 3. c. 78.

(16) The law of Ina referred to is c. 77. *de incendiariis et veneficis*; it is not very easy to render its meaning exactly, but it does not seem an authority

was executed by a kind of *lex talionis*; for the incendiaries were burnt to death [m]: as they were also by the Gothic constitutions [n]. The statute 8 Hen. VI. c. 6. made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to felony by the general acts of Edward VI. and queen Mary; and now the punishment of all capital felonies is uniform, namely, by hanging. The offence of arson was denied the benefit of clergy by statute 23 Hen. VIII. c. 1., but that statute was repealed by 1 Edw. VI. c. 12., and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduc-
[223] tion from the statute 4 & 5 P. & M. c. 4., which expressly denied it to the accessory before the fact [o]; though now it is expressly denied to the principal in all cases within the statute 9 Geo. I. c. 22. (17)

[m] Brit. c. 9.
[n] Stiernh. *de jure Goth.* l. 3. c. 6.
[o] 11 Rep. 35. 2 Hal. P. C. 346. 347. Fost. 336.

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thority for the position in the text. After some directions as to the ordeal by water or fire, which was to be the mode of trial, the law goes on thus: *si tunc juramentum producere nequeat, et ille impurus sit, in potestate senioris, qui ad eandem urbem pertinet, positum sit,* AN VITAM HABEAT, VEL NON HABEAT.

(17) Several statutes, which I shall hereafter have occasion to notice, have extended the crime and punishment of arson to other subject matters, requiring protection, and many of them use the words "set fire to" either alone, or in the alternative with the word "burn." The important statutes 9 G. 1. c. 22., and the 43 G. 3. c. 58. use the words "set fire to" alone; but no case has decided that an actual burning is not equally necessary to satisfy these words; see Taylor's case, 2 East, P. C. c. 21. s. 4. Indeed, with regard to the first of these two statutes, it has been laid down more than once by the judges that it did not alter the nature of the crime, or create any new offence, but only excluded the principal from clergy more clearly than he was before. Spalding's case. Breeme's case, 2 East, P. C. c. 21. s. 6. By a farther provision of the 9 G. 1. c. 22., the offender may be required by order of the king in council to surrender within forty days after proclamation made in the manner therein stated, in default of which the court may award execution; and the same act provides that for the more impartial trial of offences under it, they may be inquired of, tried, and determined in any county as if the fact had been there committed. Upon which clause it hath been holden, that the private prosecutor has his option to prosecute in a different county from that in which the crime was committed. Mortis's case, 2 East, P. C. c. 20. s. 10.

II. BURGLARY, or nocturnal housebreaking, *burgi latrocinium*, which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature; an invasion, which in such a state would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor, if he can, (as was shewn in a former chapter [p]) they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully [q]; *quid est sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nusancers, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case [r].

THE definition of a burglar, as given us by sir Edward [224]
Coke [s], is, "he that by night breaketh and entereth into a "mansion-house [of another,] with intent to commit a felony." In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

1. THE *time* must be by night, and not by day; for in the day time there is no burglary. We have seen [t], in the

[p] See pag. 180.
[q] *pro domo*, 41.
[r] 1 Hal. P.C. 547.
[s] 3 Inst. 63.
[t] See pag. 180, 181.

case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: antiently the day was accounted to begin only at sunrising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary [u]. But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

2. As to the *place*. It must be, according to Sir Edward Coke's definition, in a *mansion*-house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei* [v]. But it does not seem absolutely necessary that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night [w]; though that perhaps sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be, "*nocturna diruptio*
[225] "*habitaculi alicujus, vel ecclesiæ, etiam murorum portarumve ci-*
"*vitatis aut burgi, ad feloniam aliquam perpetrandam.*" And therefore we may safely conclude, that the requisite of its being *domus mansionalis* is only in the burglary of a private house: which is the most frequent, and [in] which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling-house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only

[u] 3 Inst. 63. 1 Hal. P. C. 550. 1 Hawk. P.C. c.38. § 2.
[v] 3 Inst. 64.
[w] Spelm. *Gloss. t. Burglary*, 1 Hawk. P.C. c.38.

left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the fact committed [x]. And if the barn, stable, or warehouse, be parcel of the mansion-house and within the same common fence [y], though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home-stall [z]. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner. [a] So also is a room or lodging, in any private house, the mansion for the time being of the lodger; if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner [b]. Thus too the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers. [c] But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwelling-house, nor can burglary be committed therein: for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein, when I never lie there [d]. Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein [e]; for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the same circumstances (18).

[226]

[x] 1 Hal. P. C. 556. Fost. 77.
[y] *K. v. Garland*, P. 16 G. III. by all the judges.
[z] 1 Hal. P. C. 558. 1 Hawk. P. C. c. 38. § 21.
[a] 1 Hal. P. C. 556.
[b] Kel. 84. 1 Hal. P. C. 556.
[c] Foster, 38, 39.
[d] 1 Hal. P. C. 558.
[e] 1 Hawk. P. C. c. 38. § 35.

(18) But this is provided for, when committed, while the owner, his wife, children, or servants are within, by the 5 & 6 E. 6. c. 9. See post, 241.

3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once: for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars [f]. There must in general be an actual breaking; not a mere legal *clausum fregit*, (by leaping over invisible ideal boundaries, which may constitute a civil trespass,) but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window: picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is so [g]. But to come down a chimney is held a burglarious entry; for that is as much closed, as the nature of things will permit [h]. So also to knock at the door, and upon opening it to rush in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have
[227] been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process [i]. And so, if a servant opens and enters his master's chamber-door with a felonious design; or if any other person lodging in the same house or in a public inn, opens and enters another's door, with such evil intent, it is burglary. Nay, if the servant conspires with a robber and lets him into the house by night, this is burglary in both [k]; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money,

[f] 1 Hal. P. C. 551.
[g] 1 Hal. P.C. 552, 553.
[h] 1 Hawk. P.C. c. 38. § 6. 1 Hal. P.C. 552.
[i] 1 Hawk. P.C. c.38. §§ 8, 9, 10.
[k] Stra. 881. 1 Hal. P. C. 553. 1 Hawk. P.C. c.38. § 14.

are all of them burglarious entries [l]. The entry may be before the breaking, as well as after: for by statute 12 Ann. c.7. if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or, being in such house, shall commit any felony; and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon [m] holding the affirmative, and sir Matthew Hale [n] the negative. But it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary. (19)

4. As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the [228]

[l] 1 Hal. P.C. *555*. 1 Hawk. P. C. c.38. § 11. •Fost.108.

[m] Elem. *65*.

[n] 1 Hal. P.C. *554*.

(19) There must be an actual entry, though it need not always be made by actual force, but may be obtained by fraud, conspiracy, or threat. If, for example, the owner, intimidated by the threats of the robber, opens the door to him, and he enters, such entry will be burglarious; but if having opened the door under the same apprehension he throws his money or goods out to the robber, who carries them off without entry, this would not be burglary. In the text it is stated, that an entry even "with an instrument held in the hand is sufficient;" but it should seem that this must be understood not of an instrument used for the purpose of the breaking, but of one used for that of effecting the intended felony after the breaking is complete. Thus, the hook or the pistol mentioned in the text are means to procure the goods intended to be taken, the one immediately, the other mediately; but where the only evidence of entry was proof that the centre-bit by which a panel of the house-door had been bored through, had penetrated within the house, the prisoners were acquitted. This was an instrument useful *only* to effect the breaking; and it was not ill-compared in argument with the breaking a wall by a pickaxe, and part of the pickaxe in the violence of breaking being within the house, which it was said could never be considered as evidence of an entry. Hughes' case, 1 Leach, Cr. C. 406.

thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute; since that statute, which makes an offence felony, gives it incidentally all the properties of a felony at common law[o]. (20)

Thus much for the nature of burglary; which is a felony at common law, but within the benefit of clergy. The statutes, however, of 1 Edw. VI. c. 12. and 18 Eliz. c. 7. take away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all abettors and accessories before the fact[p]. And, in like manner, the laws of Athens, which punished no simple theft with death, made burglary a capital crime[q]. (21)

[o] 1 Hawk. P.C. c. 38. § 38.

[p] Burglary in any house belonging to the plate glass company, with intent to steal the stock or utensils, is by statute 13 Geo. III. c. 38. declared to be single felony, and punished with transportation for seven years.

[q] Pott. Antiq. b. 1. c. 26.

(20) The intent must be actually felonious, not merely so by construction of law; thus, if the intent be to beat a person, it will not be burglary, though killing or murder should be the consequence. Where, indeed, one premeditatedly does an unlawful act, the law, in judging of that act, will presume him to have intended all the consequences that naturally flow from it, and, therefore, in such a case, would presume the beating to have been done with intent to kill; in such a case it would be immaterial at what stage in the transaction the intent to kill was first conceived, and it may very well be supposed to have entered into the man's heart subsequently to the first intent, and yet before the fatal blow given. But in this case the felonious intent must have been conceived before the entry; and though the commission of a felony is pregnant evidence of such an intent, it is not conclusive. See East's P.C. c. xv. s. 22.

(21) As to the trial and punishment of accessories before the fact to burglary for a misdemeanour, see 3 G. 4. c. 38. ante, p. 40. n. 5.

CHAPTER THE SEVENTEENTH.

OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next and last species of offences against private subjects, are such as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larciny*, and *malicious mischief*: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of *forgery*. Of these three in their order.

I. LARCINY, or *theft*, by contraction for latrociny, *latrocinium*, is distinguished by the law into two sorts; the one called *simple* larciny, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound* larciny, which also includes in it the aggravation of a taking from one's house or person.

AND, first, of *simple* larciny; which, when it is the stealing of goods above the value of twelve-pence, is called *grand* larciny; when of goods to that value, or under, is *petit* larciny; offences which are considerably distinguished in their punishment, but not otherwise. (1) I shall therefore first con-

(1) This distinction is now nearly obliterated, as petit larciny was always punishable by whipping and imprisonment, and is now by transportation or hard labour. 4 G. 1. c. 11., 53 G. 3. c. 162. Still, as grand larciny is capital at common law, and the benefit of clergy is, strictly speaking, available only *once*, on a second offence the punishment *might* be death; whereas, petit larciny, however often repeated, can never be capital; conviction, too, of grand larciny incapacitates from giving testimony, till the punishment be suffered; petit larciny never has this effect. 31 G. 3. c. 35.

sider the nature of simple larciny in general; and then shall observe the different degrees of punishment inflicted on it's two several branches.

Simple larciny then is "the felonious taking, and carrying away, of the personal goods of another." This offence certainly commenced then, whenever it was, that the bounds
[230] of property, or laws of *meum* and *tuum*, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seised to his present use, seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen [a], any violation of that property is subject to be punished by the laws of society: though how far that punishment should extend, is matter of considerable doubt. At present we will examine the nature of theft, or larciny, as laid down in the foregoing definition.

1. It must be a *taking*. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larciny. As if A lends B a horse, and he rides away with him: or, if I send goods by a carrier, and he carries them away; these are no larcinies [b]. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcinies [c]; for here the *animus furandi* is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. (2) But bare non-delivery shall not of course be

[a] See Vol. II. p. 8. &c. [b] 1 Hal. P. C. 504. [c] 3 Inst. 107.

(2) This point, so shortly stated in the text, has given rise to much discussion; the principle, however, on which the numerous cases turn, is very simple and clear. Wherever a person delivers goods to another, he intends thereby to part with the property, and the possession of them, or with the possession only. In the first case no larciny can be committed by

intended to arise from a felonious design; since that may happen from a variety of other accidents. (3) Neither by the

by the taker; for it is essential to larciny, that in the taking, there should be trespass; whereas in the case supposed, the owner voluntarily parts with the absolute dominion of the goods, and whatever fraud may have been used, the taker has gained no more than the owner intended him to have. He, the owner, is indeed deceived; he relied on a story which was false; he believed the taker to be a person different from what he really was, or, he imagined he had a payment which turned out to be valueless. In short, in every one of these cases it will be found on examination, that the party's real complaint is not the loss of the goods, but the disappointment as to some promised equivalent. The short rule, therefore, as to this class is, that whenever the property is parted with as well as the possession, no fraud in the procuring that possession will make the taking felonious.

But where the owner parts only with the possession of the goods, the taking may or may not be felonious; the principle on which it becomes either the one or the other is, there being or not being a trespass in law in the taking, and the general practical criterion to try that by, is the intention of the taker at the time of taking. A requests B to lend him his horse to go to Richmond on; he intends at the time to use the horse for that purpose only, and B complying with his request, intrusts him with the horse for that purpose. It is clear that here the possession is obtained fairly, by a contract entered into between the parties; A is now the lawful special owner of the horse, and no unlawful design of appropriating the horse to himself, conceived afterwards pending the contract, can make that first innocent taking a trespass. When, indeed, the special purpose is accomplished, the special property ceases, and the special possession also ceases in contemplation of law; the general owner is once again invested with the legal possession; and if *then*, after the contract is at an end, A conceives and executes the design of riding the horse away, this is a new taking, not made under contract, but a trespass, and felonious.

Next, let us suppose A requesting B to lend him his horse to go to Richmond, as before, but with intent to ride him not there, but elsewhere, and steal him. B complies with this request, and intrusts A with the horse, for the alleged purpose only. It is equally clear here that the possession is not obtained by any contract; if there were any contract, it must be to go to Richmond, for B knew of no other intention; but to that contract A was no party, and therefore cannot rely on it. The conclusion follows, that the possession not being obtained by contract, was by trespass, and consequently the taking was felonious.

The short rule then as to these two classes of cases is this, that where the possession is obtained by a fraud conceived at the time of obtaining it, the taking by such fraud is felonious; but that no after-conceived fraud will make a taking, innocent at the time, felonious. It is the arduous province of the jury to apply this test, collecting from all the circumstances of a case what was the prisoner's intention.

The student will find this subject discussed, and all the important cases clearly stated and arranged, in East's P. C. cap. 16. s. 102, &c.

(3) Bare non-delivery does not in itself raise a presumption of a felonious

common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 Hen. VI. c. 1. the servants of persons deceased, accused of embezzling their masters' goods, may by writ out of chancery (issued by the advice of the chief
[231] justices and chief baron, or any two of them,) and proclamation made thereupon, be summoned to appear personally in the court of king's bench, to answer their masters' executors in any civil suit for such goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII. c. 7. if any servant embezzles his master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old. But if he had not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them is felony at common law [d]. (4) So if a guest robs his inn or tavern of a piece of plate, it is larceny:

[d] 1 Hal. P. C. 506.

taking, but other circumstances will often prove it to be such; and many cases even of finding property and retaining it have been adjudged to be felonious, where from the circumstances the jury had reason to conclude that the finder knowing the owner, fraudulently concealed the goods from him, and converted them to his own use. Of this kind are the cases of parcels left in hackney coaches, and not restored to the owners, where the jury believed that the coachman knew them, or the places where they were to be found. See 2 East's P. C. c. 16. s. 99.

(4) The statute of Hen. 8. is, by the words of it, so confined in its operations, and the common law embraces so large a number of the cases that might be supposed to fall under it, that it is but little resorted to. But there was a case not falling under it, and upon which much doubt existed at common law, where the goods taken were first delivered to the servant for the master, and by him misapplied and embezzled before they reached the master's hands, so that the master never had any possession of them distinct from that actual possession of the servant. It seemed rather a strong application of technical reasoning under such circumstances, to make the servant's embezzlement a felonious taking from the possession of the master. A decision in the case of a banker's clerk, who received a bill from one of his master's customers, and applied it to his own use, that this was not felony, was justly deemed very alarming, and produced the 39 G. 3. c. 85., which enacts, that servants or clerks who, by virtue of their employment, receive into their possession money or goods, bills, &c. on their master's account, and fraudulently embezzle or secrete any part thereof, shall be deemed to have feloniously stolen the same, and they and their abettors are made punishable by transportation for fourteen years. 2 East's P. C. c. 16. s. 18.

for he hath not the possession delivered to him, but merely the use [e], and so it is declared to be by statute 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready-furnished lodgings. Under some circumstances also a man may be guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with an intent to charge the hundred with the loss according to the statute of Winchester [f]. (5)

THERE must not only be a taking, but a *carrying away*; *cepit et asportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs: these have been adjudged sufficient carryings away, to constitute a larciny [g]. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprized before he can make his escape with it; this is larciny [h].

3. THIS taking, and carrying away, must also be *felonious*; [232] that is, done *animo furandi*: or, as the civil law expresses it, *lucri causâ* [i]. This requisite, besides excusing those who labour under incapacities of mind or will, (of whom we spoke sufficiently at the entrance of this book [k],) indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse without his knowledge, and brings him home again: if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I distrein another's cattle, or seize them: all these are misde-

[e] 1 Hawk. P. C. c. 33. § 6.
[f] Fost. 123, 124.
[g] 3 Inst. 108. 109.
[h] 1 Hawk. P. C. c. 33. § 28.
[i] 1 Inst. 4. 1. 1.
[k] See pag. 20.

(5) See post, p. 293.

mesnors and trespasses, but no felonies [l]. (6) The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larciny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or *animum furandi*: wherefore they must be left to the due and attentive consideration of the court and jury.

4. This felonious taking and carrying away must be *of the personal goods of another*: for if they are things *real*, or savour of the realty, larciny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larciny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable [m]. And if they were severed by violence, so as to be changed into moveables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be said to be taken *from the proprietor*, in this their newly acquired state of mobility, (which is essential to the nature of larciny,) being

[233]

[l] 1 Hal. P.C. 509. [m] See Vol. II. p. 16.

(6) But it must be understood, that if the arrear of rent, or claim of right be used as a mere colour to a felonious taking, which, though hard, is not impossible to be proved, so far from making the act innocent, they are the highest aggravation of the offence. A strong instance of this was the case of two persons, who procured possession of a house by a fraudulent ejectment, and arrested the tenant, and then rifled the house. This was done under an allegation that she was the tenant of one of them, and that rent was in arrear. All this was false; and the jury were directed, that if they believed that the prisoners had done all this with an intent to rob, they ought to find them guilty. This was done, and they were executed. Farr's case, Kel. Rep. 43.

never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and come again at *another* time, when they are so turned into personalty, and take them away; it is larceny: and so it is, if the owner, or any one else, has severed them [n]. And now, by the statute 4 Geo. II. c. 32. to steal, or rip, cut, or break, with intent to steal, any lead, or iron bar, rail, gate, or palisado, fixed to a dwelling-house or out-house, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to transportation for seven years; (7) and to steal, damage, or destroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to steal or otherwise destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots, or the roots of madder when growing, are [o] punishable criminally, by whipping, small

[n] 3 Inst. 109. 1 Hal. P.C. 510. 9 Geo. III. c. 41. 13 Geo. III. c. 32.
[o] Stat. 43 Eliz. c. 7. 15 Car. II. c. 2. 13 Geo. III. c. 33. 31 Geo. II. c. 35. 6 Geo. III. c. 48.

(7) In a case where the lead stolen was fixed to a church, it was held that this was comprehended under the words "any other building," which were not to be confined in construction to the same sort of buildings only as those previously specified in the act. Lord Mansfield said, there was a great difference between bringing a case within the equity of an act, where it was not within the words, and taking a case out of the meaning of an act by an equitable construction, where it was within the words. That the first ought never to be done in a criminal case, neither ought the second, if the case were in equal mischief with others clearly within the meaning of the act. That here the words of the act comprised the case in question, and churches were equally within the mischief with dwelling-houses. *R.* v. *Parker*, East's P. C. c. 16. s. 31.

This act has been extended by the 21 G. 3. c. 68. to copper, brass, and bell-metal, and to iron rails or fencing in any square, court, or other place. Instead of transportation, the court may sentence the party to imprisonment with hard labour for any term not exceeding three years nor less than one, and public whipping not more than three times; all aiders, abettors, and those who buy or receive the things stolen, knowing them to be such, are made liable to the same punishment, and may be tried before conviction of the principal.

fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. Moreover, the stealing by night of any trees, or of any roots, shrubs, or plants to the value of *5s.* is by statute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchasers thereof, knowing the same to be stolen: and by statutes 6 Geo. III. c. 48. and 13 Geo. III. c. 33. the stealing of any
[234] timber trees therein specified[p], and of any root, shrub, or plant, by day or night, is liable to pecuniary penalties for the two first offences, and for the third is constituted a felony liable to transportation for seven years. Stealing ore out of mines is also no larceny, upon the same principle of adherence to the freehold; with an exception only as to mines of black lead, the stealing of ore out of which, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment, or return from such transportation, is felony without benefit of clergy, by statute 25 Geo. II. c. 10. (8) Upon nearly the same principle the stealing of writings relating to a real estate is no felony; but a trespass[q]: because they concern the land, or (according to our technical language) *savour* of the *realty*, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern[r].

Bonds, bills, and notes, which concern mere *choses in action*, were also at the common law held not to be such goods whereof larciny might be committed; being of no intrinsic value[s], and not importing any property in *possession* of the person from whom they are taken. But by the statute 2 Geo. II. c. 25. they are now put upon the same footing, with

[p] Oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and hornbeam.

[q] 1 Hal. P. C. 510. Stra. 1137.

[r] See Vol. II. pag. 428.

[s] 8 Rep. 33.

(8) By the 39 & 40 G. 3. c. 77., summary punishments, increasing with the repetition of the offences, are imposed upon the stealing of coal, culm, coke, wood, iron, ropes, or leather, not exceeding five shillings in value, and from certain specified places. This act does not make any new felony, but subjects a common law felony to summary punishment.

respect to larcinies, as the money they were meant to secure (9). By statute 15 Geo. II. c. 13. officers or servants of the bank of England, secreting or embezzling any note, bill, warrant, bond, deed, security, money, or effects intrusted with them or with the company, are guilty of felony without benefit of clergy. The same is enacted by statute 24 Geo. II. c. 11. with respect to officers and servants of the South-sea company. And by statute 7 Geo. III. c. 50. if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or pacquet, containing any bank note or other valuable paper particularly specified in the act, or shall steal the same out of any letter or pacquet, he shall be guilty of felony without benefit of clergy. Or, if he shall destroy any letter or pacquet [235] with which he has received money for the postage, or shall advance the rate of postage on any letter or pacquet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony (10). Larciny also could not at common law be committed of treasure-trove, or wreck, till seized by the king or him who hath the franchise, for till such seizure no one hath a determinate property therein (11). But, by statute 26 Geo. II. c. 19. plun-

(9) The principle and the provisions of this act are extended by the 3 G. 4. c. 24. to the receivers of such securities. See ante, p. 133. n. 10.

(10) By the same statute (7 G. 3. c. 50.) it is made a capital felony in any person to rob a mail of any letter or pacquet, or to steal any letter or pacquet out of any mail, or bag, or post-office, although such robbery or stealing shall not appear to have been from the person, or on the highway, or in any dwelling-house or out-house, and although no person was put in fear by it. This statute, it has been observed, does not make the stealing letters generally a capital offence, but only stealing them from certain specified places: this is a definite act, local in its nature, and cannot be extended by construction to a new taking in every county into which the thing is conveyed, as it would on general principles in the case of simple larciny. And therefore where a prisoner had stolen the letters out of the Bristol mail somewhere in Wilts or Berks, and did not leave the coach till it arrived at Hyde Park Corner, he was held to have been improperly tried and convicted at the Old Bailey; for the offence was not committed in Middlesex, but was complete in one of those two former counties. East's P. C. c. 16. s. 39. Thomas's case. See post, pp. 304. 305.

(11) There seems to be some incorrectness in the generality of this position, as applied to treasure-trove, waifs, &c.; for though the lord has no determinate property in them till seizure, the true owner, though unknown, has still a property in them. Where, indeed, the circumstances of the case furnish a presumption of an intended dereliction of such property on the part

dering or stealing from any ship in distress (whether wreck or no wreck) is felony without benefit of clergy: in like manner, as, by the civil law[s], this inhumanity is punished in the same degree as the most atrocious theft.

LARCINY also cannot be committed of animals, in which there is no property either absolute or qualified: as of beasts that are *ferae naturae*, and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; fish, in an open river or pond; or wild fowls at their natural liberty[t]. But if they are reclaimed or confined, and may serve for food, it is otherwise even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larciny may be committed[u]. And now, by statute 9 Geo. I. c. 22. to hunt, wound, kill, or steal any deer; to rob a warren; or to steal fish from a river or pond (being in these cases armed and disguised); also to hunt, wound, kill, or steal any deer, in the king's forests or chases inclosed, or in any other inclosed place where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act; all these are felonies without benefit of clergy. And the statute 16 Geo. III. c. 30. enacts, that every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer in *any* forest, chase, purlieu, or antient walk, or in any *inclosed* park, paddock, wood, or other ground, where deer are usually
[236] kept, shall forfeit the sum of 20*l.*, or for every deer actually killed, wounded, destroyed, taken in any toyl or snare, or carried away, the sum of 30*l.*, or double those sums in case the offender be a keeper: and upon a second offence, (whether of the same or a different species,) shall be guilty of felony, and transportable for seven years. Which latter punishment is likewise inflicted on all persons armed with offensive weapons, who shall come into such places with an intent to commit any of the said offences, and shall there un-

[s] *Cod.* 6. 2. 18. 1 Hawk. P.C. c. 33. § 41. 1 Hal. P.C. 511.
[t] 1 Hal. P.C. 511. Fost. 366.

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part of the owner, there the rule holds good, because the taking is not against his will. East's P.C. c. 16. s. 40.

lawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. (12) Also by statute 5 Geo. III. c. 14. the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard: and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies [v] by night in open warrens: and a forfeiture of five pounds to the owner of the fishery, is made payable by persons taking or destroying (or *attempting* so to do) any fish in any river or other water within any inclosed ground, being private property. (13) Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19., is also felony [w]. (14)

[v] See stat. 22 & 23 Car. II. c. 25. [w] 3 Inst. 98.

(12) This statute, by imposing a minor penalty for the same offence, was held to have virtually repealed that part of the clause in the preceding statute which relates to the hunting, &c. deer by persons not armed, and disguised. During the existence of this act, therefore, no indictment lay for deer-stealing in the first instance; but these clauses were repealed by the 42 G. 3. c. 107. This statute distinguishes between the offences of hunting, wounding, or destroying deer in inclosed and uninclosed places: the first is felony punishable in the principal, aiders and abettors, by transportation for seven years; the second subjects the offender, for the first time, to a penalty of 50*l*., to be doubled in case he is a keeper or in any manner entrusted with the care of the deer. This penalty of 50*l*. (by 51 G. 3. c. 120.,) may be mitigated at the discretion of the convicting magistrates to any sum not less than 20*l*. If the penalty be not immediately paid, and cannot be levied by distress, the offender is to be imprisoned for six months; and the repetition of the offence makes the party a felon, liable to transportation for seven years.

As to the other capital felonies under the 9 G. 1. c. 22., mentioned in the text, they are now by the 4 G. 4. c. 54. punishable with transportation for seven years, or imprisonment with or without hard labour for any term not exceeding three. See ante, p. 4. n. 1.

(13) The words in the statute are, fish "bred, kept, or preserved" in any river, &c.; and where the fish were taken from a river, which ran its natural course through an inclosed park, and in which the fish were no otherwise preserved than by a prohibition of persons from angling within the park walls, but the fish passed freely in and out of the park, the case was held not to be within the statute. Carradice and Cleasby's case, 2 Russell, L. 1199.

(14) Stealing hawks, in disobedience to the rules prescribed by the statute 34 Ed. 3. c. 22., is made felony by the statute 37 Ed. 3. c. 19. The former

It is also said[x] that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitae naturae*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool[y], larciny may be committed; and also of the flesh of such as are either *domitae* or *ferae naturae*, when killed[z]. [235*] As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them[a], yet they are not of such estimation, as that the crime of stealing them amounts to larciny[b]. But by statute 10 Geo. III. c. 18. very high pecuniary penalties, or a long imprisonment, and whipping in their stead, may be inflicted by two justices of the peace, (with a very extraordinary mode of appeal to the quarter sessions,) on such as steal, or knowingly harbour a stolen *dog*, or have in their custody the skin of a dog that has been stolen[c].

Notwithstanding, however, that no larciny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larciny to steal it; and an indictment will lie for the goods of a person unknown[d]. In like manner as,

[x] Dalt. Just. c. 156.

[y] Dal. 21. Crompt. 36. 1 Hawk. P. C. c. 33. § 43. 1 Hal. P. C. 511. The King v. Martin, by all the judges. P. 17 Geo. III.

[z] 1 Hal. P. C. 511.

[a] See Vol. II. pag 393.

[b] 1 Hal. P. C. 512.

[c] See the remarks in pag. 4. The statute hath now continued eighteen sessions of parliament unrepealed.

[d] 1 Hal. P. C. 512.

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statute describes what is to be done by the finder of a stray falcon, tercelet, laner, laneret, or other falcon, and punishes him who conceals such falcon, &c. with two years imprisonment, and the price of the bird to be paid to his lord. Lord Coke is positive that the word hawk was not in the original roll of the act, and says that "the law extendeth only to such as be of the kinde of faulcons," long winged. 3 Inst. 97.

among the Romans, the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner[e]. This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no owner, (though a matter of great indecency,) is no felony, unless some of the grave-clothes be stolen with it[f]. Very different from the law of the Franks, which seems to have respected both as equal offences: when it directed that a person, who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his readmission[g]. (15)

HAVING thus considered the general nature of simple larciny, I come next to treat of its *punishment*. Theft, by the Jewish law, was only punished with a pecuniary fine, and satisfaction to the party injured[h]. And in the civil law, till some very late constitutions, we never find the punishment [236*] capital. The laws of Draco at Athens punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued[i]; except that once, in a time of dearth, it was made capital to break into a garden, and steal figs: but this law, and the informers against the offence, grew so odious, that from them all malicious informers were styled sycophants; a name which we have

[e] Gravin, *l.* 8. § 106.
[f] See Vol. II. pag. 429.
[g] Montesq. Sp. L. b. 30. ch. 19.
[h] Exod. c. xxii.
[i] Petit. *LL. Attic. l.* 7. *tit.* 5.

(15) The offence, however, even when committed for the purpose of dissection, is punished as a misdemeanor. *R.* v. *Lynn*, 2 T. R. 733.

The punishment of those who violated the sanctity of sepulchres, and stole dead bodies, was very severe by the civil law. If the person convicted was of low condition (*humilioris fortunæ*), it was death; if of higher rank, banishment, or the mines. Ff. xlvii. 12. 10.

It is a common notion that the French law takes no cognisance of this offence; but it is punished by imprisonment for any period not less than three months, or more than a year, and a fine not less than 16, or more than 200 francs. Code Penal, l. iii. t. 2. 360.

much perverted from its original meaning. From these examples, as well as the reason of the thing, many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft[j]. And certainly the natural punishment for injuries to property seems to be the loss of the offender's own property: which ought to be universally the case, were all men's fortunes equal. But as those who have no property themselves, are generally the most ready to attack the property of others, it has been found necessary instead of a pecuniary to substitute a corporal punishment; yet how far this corporal punishment ought to extend, is what has occasioned the doubt. Sir Thomas More[k], and the marquis Beccaria[l], at the distance of more than two centuries from each other, have very sensibly proposed that kind of corporal punishment, which approaches the nearest to a pecuniary satisfaction; *viz.* a temporary imprisonment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most slavish kind: in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But notwithstanding
[237] all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital: and Puffendorf[m], together with sir Matthew Hale[n], are of opinion that this must always be referred to the prudence of the legislature; who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions[o]? Yet both these writers agree, that such punishment should be cautiously inflicted, and never without the utmost necessity.

[j] *Est enim ad vindicanda furta nimis atrox, nec tamen ad refraenanda sufficiens; quippe neque furtum simplex tam ingens facinus est, ut capite debeat plecti; neque ulla poena est tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quaerendi victus habent.* (Mori *Utopia.* edit. Glasg. 1750. pag. 21.) —*Denique, cum lex Mosaica, quanquam inclemens et aspera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiae qua pater imperat filiis majorem indulsisse nobis invicem saeviendi licentiam. Haec sunt cur non licere putem; quam vero sit absurdum, atque etiam perniciosum republicae, furem atque homicidam ex aequo puniri, nemo est (opinor) qui nesciat.* (*Ibid.* 39.)

[k] *Utop.* pag. 42.

[l] Ch. 22.

[m] de. j. n. & g. l. 8. c. 3. § 23.

[n] 1 Hal. P. C. 18.

[o] See pag. 9.

Our antient Saxon laws nominally punished theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle [p]. But in the ninth year of Henry the first, this power of redemption was taken away, and all persons guilty of larciny above the value of twelvepence, were directed to be hanged; which law continues in force to this day [q]. For though the inferior species of theft, or petit larciny, is only punished by imprisonment or whipping at common law [r], which by statute 4 Geo. I. c. 11., may be extended to transportation for seven years, as is also expressly directed in the case of the plate-glass company [s], yet the punishment of grand larciny, or the stealing above the value of twelvepence, (which sum was the standard in the time of king Athelstan, eight hundred years ago,) is at common law regularly death. Which, considering the great intermediate alteration [t] in the price or denomination of money, is undoubtedly a very rigorous constitution; and made sir Henry Spelman (above a century since, when money was at twice its present rate) complain, that while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper [u]. It is true, that the mercy of juries will [238] often make them strain a point, and bring in larciny to be under the value of twelvepence, when it is really of much greater value: but this, though evidently justifiable and proper, when it only reduces the present nominal value of money to the antient standard [w], is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge. (16) It is likewise true, that by the mer-

[p] Tac. *de mor. Germ.* c. 12.

[q] 1 Hal. P. C. 12. 3 Inst. 53.

[r] 3 Inst. 218.

[s] Stat. 13 Geo. III. c. 38.

[t] In the reign of king Henry I. the stated value at the exchequer of a pasture-fed ox, was one shilling; (*Dial. de Scacc. l.* 1. § 7.) which, if we should even suppose [it] to mean the *solidus legalis* mentioned by Lyndewode (*Prov. l.* 3. *t.* 13. See Vol. II. pag. 509.) or the 72d part of a pound of gold, is only equal to 13*s.* 4*d.* of the present standard.

[u] *Gloss.* 350.

[w] 2 Inst. 189.

(16) It is little better than a pious perjury, if such a term be at all allowable, even when restrained within the limits prescribed by the text. If this

ciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larciny to the value of thirteen pence, or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death: but this is only for the first offence. And in many cases of simple larciny the benefit of clergy is taken away by statute: as for horse-stealing in the principals, and accessories both *before* and *after* the fact [x]; theft by great and notorious thieves in Northumberland and Cumberland [y]; taking woollen cloth from off the tenters [in the night time] [z], or linens, fustians, callicoes, or cotton goods, from the place of manufacture [a]; (which extends, in the last case, to aiders, assisters, procurers, buyers, and receivers;) feloniously driving away, or otherwise stealing one or more sheep or other cattle specified in the acts, or killing them with intent to steal the whole or any part of the carcase [b], or aiding or assisting therein; thefts on navigable rivers above the value of forty

[x] Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Eliz. c. 12.

[y] Stat. 18 Car. II. c. 3.

[z] Stat. 22 Car. II. c. 5. But as it sometimes is difficult to prove the identity of the goods so stolen, the *onus probandi* with respect to innocence is now by statute 15 Geo. II. c. 27. thrown on the persons in whose custody such goods are found; the failure whereof is, for the first time, a misdemesnor punishable by the forfeiture of the treble value; for the second, by imprisonment also; and the third time it becomes a felony, punished with transportation for seven years. (17)

[a] Stat. 18 Geo. II. c. 27. Note, in the three last cases an option is given to the judge to transport the offender: for *life* in the first case, for *seven years* in the second, and for *fourteen years* in the third; — in the first and third cases *instead of* sentence of death, in the second *after* sentence is given.

[b] Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34. See Vol. I. pag. 88.

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system of adaptation, even thus limited, were to be applied to all the cases in our law, to which it might be applied, it is not very easy to foresee all the consequences. What, for example, would become of the statutory qualification for the elective franchise in freeholders? But in truth, besides the dangerous responsibility which juries take upon themselves, when they thus tamper with the law on account of some real or imagined defect in it, such partial and incomplete remedies as they afford thereby are the surest mode of delaying a more regular and perfect alteration.

(17) The provision of 18 C. 2. c. 3. is repealed by 1 G. 4. c. 116., as is the similar one in 18 G. 2. c. 27., by the 51 G. 3. c. 41. The 4 G. 4. c. 53. repeals the capital part of the 22 C. 2. c. 5., and substitutes transportation for life, or any term not less than seven years, or imprisonment with or without hard labour for any term not exceeding seven years.

shillings [c]; or being present, aiding and assisting thereat (18); plundering vessels in distress, or that have suffered shipwreck [d]; stealing letters sent by the post [e]; and also stealing deer, fish, hares, and conies under the peculiar circumstances mentioned in the Waltham black act [f]. (19) Which additional severity is owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties men would otherwise lie under to preserve those goods, which are so easily carried off. Upon which last principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle [g]; and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths [h]; both which constitutions seemed to be borrowed from the laws of Athens [i]. And so, too, the antient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left in the field: such kind of property (which no human industry can sufficiently guard) being esteemed under the peculiar custody of Heaven [j]. And thus much for the offence of *simple* larciny. [239]

MIXED or *compound* larciny is such as has all the properties of the former, but is accompanied with either one, or both, of the aggravations of a taking from one's *house* or *person*. First, therefore, of larciny from the *house*, and then of larciny from the *person*.

1. LARCINY from the *house*, though it seems (from the considerations mentioned in the preceding chapter [k]) to have a higher degree of guilt than simple larciny, yet it is not at all distinguished from the other at common law [l]; unless where it is accompanied with the circumstance of breaking the

[c] Stat. 24 Geo. II. c. 45.
[d] St. 12 Ann. st. 2. c. 18. 26 Geo. II. c. 19.
[e] Stat. 7 Geo. III. c. 50.
[f] Stat. 9 Geo. I. c. 22.
[g] *Ff.* 47. *t.* 14.
[h] *Ibid. t.* 17.
[i] Pott. Antiq. b. 1. c. 26.
[j] Stiernh. *de jure Goth. l.* 3. *c.* 5.
[k] See pag. 223.
[l] 1 Hawk. P. C. c. 36. § 1.

(18) This statute is also repealed as to its capital punishment by 4 G. 4. c. 53., and the same punshment, without reference to the value of the goods, substituted, as mentioned in the last note.

(19) See ante, p. 234, 235.

house by night; and then we have seen that it falls under another description, *viz.* that of burglary. But now by several acts of parliament, (the history of which is very ingeniously deduced by a learned modern writer [m], who hath shewn them to have gradually arisen from our improve-
[240] ments in trade and opulence,) the benefit of clergy is taken from larcinies committed in an house in almost every instance; except that larciny of the stock or utensils of the plate-glass company from any of their houses, *&c.* is made only a single felony, and liable to transportation for seven years [n]. (20) The multiplicity of the general acts is apt to create some confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larciny; *viz.* First, in larcinies *above the value of twelvepence*, committed, 1. In a church or chapel, with or without violence, or breaking the same [o]: 2. In a booth or tent in a market or fair in the day-time or in the night, by violence or breaking the same; the owner or some of his family being therein [p]: 3. By robbing a dwelling-house in the day-time (which *robbing* implies a breaking), any person being therein [q]: 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear [r]: which amounts in law to a robbery: and in both these last cases the accessory before the fact is also excluded from his clergy. (21) Secondly, in larcinies *to the value of five shillings*, committed, 1. By breaking any dwelling-house, or any outhouse, shop, or warehouse thereunto belonging in the day-time, although

[m] Barr. 375, *&c.* p. 482, *&c.* 4th ed.
[n] Stat. 13 Geo. III. c. 38.
[o] Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 1 Hal. P.C. 518.
[p] Stat. 5 & 6 Ed. VI. c. 9. 1 Hal. P. C. 522.
[q] Stat. 3 & 4 W. & M. c. 9.
[r] *Ibid.*

(20) But the statute 38 G. 3. c. xvii. (Local and Private acts), which continued the 13 G. 3. c. 38., enables the court before whom any such offender is tried, to adjudge him to suffer such less punishment as the court shall think fit to award.

(21) It should be observed, that none of the statutes which take away the benefit of clergy from the respective offences mentioned in this first class, specify that the value of the things taken must exceed 12*d.*; but as it is unnecessary to pray for clergy in petit larceny, these statutes will not apply to cases where the goods taken fall short of that amount.

no person be therein [s]; which also now extends to aiders, abettors, and accessories before the fact [t]: 2. By privately stealing goods, wares, or merchandize in any shop, warehouse [u], coach-house, or stable, by day or by night; though the same be not broken open, and though no person be therein [v]: which likewise extends to such as assist, hire, or command the offence to be committed. (22) Lastly, in larcinies *to the value of forty shillings* in a dwelling-house, or its out-houses; although the same be not broken, and whether any person be therein or no; unless committed against their masters by apprentices under the age of fifteen [w]. This also extends to those who aid or assist in the commission of any such offence.

2. LARCINY from the *person* is either by *privately* stealing; [241] or by open and violent assault, which is usually called *robbery*.

THE offence of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowledge, was debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 4. But then it must be such a larciny as stands in need of the benefit of clergy, *viz.* of above the value of twelvepence; else the offender shall not have judgment of death. For the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the antient law [x]. This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with

[s] Stat. 39 Eliz. c. 15.
[t] Stat. 3 & 4 W. & M. c. 9.
[u] See Foster, 78. Barr. 379. 487. 4th ed.
[v] Stat. 10 & 11 W. III. c. 23.
[w] Stat. 12 Ann. st. 1. c. 7.
[x] 1 Hawk. P. C. c. 35. § 4. The like observation will certainly hold in the cases of horse-stealing, (1 Hal. P. C. 531.) thefts in Northumberland and Cumberland, and stealing woollen cloth from the tenters; and possibly in such other cases where it is provided by any statute that simple larceny, under certain circumstances, shall be felony without benefit of clergy.

(22) This offence, whatever be the value of the goods, is now punishable with transportation for life, or any term not less than seven years, or imprisonment with or without hard labour for any term not exceeding seven years. See 4 G. 4. c. 53.

which they were practised (even in the queen's court and presence) at the time when this statute was made: besides that this is an infringement of property, in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature. And therefore the *saccularii*, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws[y]. (23)

Open and violent larciny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear[z]. 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony, so late as Henry the fourth's time[a]: but afterwards it was taken to be only a misdemesnor, and punishable with fine and imprisonment; till the
[242] statute 7 Geo. II. c. 21., which makes it a felony (transportable for seven years) unlawfully and maliciously to assault another with any offensive weapon or instrument; — or by menaces, or by other forcible or violent manner, to demand any money or goods; — with a felonious intent to rob. (24)

[y] *Ff.* 47. 11. 7. Pott. Antiq. l. 1. c. 26.
[z] 1 Hawk. P. C. c. 34.
[a] 1 Hal. P. C. 532.

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(23) The severity of this law had occasioned many very refined constructions to narrow its extent, which are now rendered unnecessary and inapplicable by the repealing statute of 48 G. 3. c. 129. By this the offence of feloniously stealing from the person, whether privily without his knowledge or not, but without such force or putting in fear as is sufficient to constitute the crime of robbery, or to be present aiding or abetting therein, is punishable by transportation for life, or any less term not less than seven years, or by imprisonment with or without hard labour for any term not exceeding three years.

(24) This statute stands repealed by the 4 G. 4. c. 54., which makes it a felony punishable by transportation for life, or any term not less than seven years, or imprisonment with or without hard labour for any term not exceeding seven years, to maliciously assault with intent to rob; by menaces or force maliciously to demand money, goods, or security for money, with intent to steal the same; maliciously to threaten to accuse any one of any crime punishable with death, transportation, or pillory, or any infamous crime with intent to extort money, security for money or goods, or to procure, aid, or abet the commission of any of these offences. As this statute like the 7 G. 2. c. 21., makes it necessary that the intent should be to rob

If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as, where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face[b]. But if the taking be not either directly from his person, or in his presence, it is no robbery[c]. 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery[d]. 3. Lastly, the taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law[e], "*qui vi rapuit, fur improbior esse videtur.*" This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcinies. For if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent[f]: neither is it capital, as privately stealing, being under the value of twelvepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear;* it is sufficient, if laid to be done by *violence*[g]. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent[h]. Thus, if a man be knocked down with-

[b] 1 Hal. P. C. 533.
[c] Comyns, 478. Stra. 1015.
[d] 1 Hawk. P. C. c. 34. § 16.
[e] *Ff.* 47. 2. 4. xxii.
[f] 1 Hal. P. C. 534.
[g] Trin. 3 Ann. by all the judges.
[h] Fost. 128.

or extort money from the same person who is assaulted or threatened with accusation, the same construction will probably be put on it. Under the former act, a man was tried who followed a chaise for some time, in which was a gentleman, and at last presented a pistol at the post-boy and bid him stop, using at the same time many violent oaths; the post-boy obeyed him, and he immediately turned towards the chaise, but perceived that he was pursued, and rode away without saying or doing any thing to the gentleman in the chaise. In this case, as the assault and menace were directed against one person, and the intent was to rob another, the prisoner was acquitted on two indictments, the first charging him with an assault on the gentleman with intent to rob him; and the second, an assault on the post-boy with intent to rob him. Russell, C. L. p. 884. Thomas's case.

out previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*,
[243] yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery[i]. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted[k], whether the forcing a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.

This species of larciny is debarred of the benefit of clergy by statute 23 Hen. VIII. c. 1., and other subsequent statutes, not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery, therefore, in a distant field, or footpath, was not punished with death[k]; but was open to the benefit of clergy till the statute 3 & 4 W. & M. c. 9., which takes away clergy from both principals and accessories before the fact, in robbery, wheresoever committed.

II. Malicious *mischief*, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak, excuse; but either out of a spirit of wanton cruelty, or black and diabolical revenge. (25) In which it bears a

[i] 1 Hawk. P.C. c. 34. § 8. [k] *Ibid.* § 14. [l] 1 Hal. P. C. 535.

(25) This description will hardly be found to apply to all the cases which are classed under the general head of malicious mischief; for example, in the offences which are provided against by 1 Ann. st. 2. c. 9. and 12 Ann. st. 2. c. 13. relative to the destruction of ships, there can be no doubt that plunder is a main if not the sole motive to the act. It is well observed in East's P. C. c. 22. s. 1. that "it often happens that a violent, lawless, and destructive spirit, however generally attributable to personal malignity and revenge, is often incited by and accompanied with a lust for plunder, regardless of the means, and hardened against the consequences. Some of the offences which remain to be described are of this sort, originating from a mixture of malice and covetousness, where the end in contemplation is some undue gain to be obtained by some violent and destructive means."

near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

And, first, by statute 22 Hen. VIII. c. 11. perversely and maliciously to cut down or destroy the powdike, in the fens of Norfolk and Ely, is felony. And in like manner it is, by many special statutes, enacted upon the occasions, made felony to destroy the several sea-banks, river-banks, public navigations, and bridges, erected by virtue of those acts of parliament. By statute 43 Eliz. c. 13. (for preventing rapine [244] on the northern borders) to burn any barn or stack of corn or grain; or to imprison or carry away any subject, in order to ransom him, or to make prey or spoil of his person or goods upon deadly feud or otherwise, in the four northern counties of Northumberland, Westmoreland, Cumberland, and Durham, or being accessory before the fact to such carrying away or imprisonment; or to give or take any money or contribution, there called *blackmail*, to secure such goods from rapine; is felony without benefit of clergy. By statute 22 & 23 Car. II. c. 7. maliciously, unlawfully, and willingly, in the night-time, to burn, or cause to be burnt or destroyed, any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns; or to kill any horses, sheep, or other cattle, is felony; but the offender may make his election to be transported for seven years; and [maliciously] to maim or hurt such horses, sheep, or other cattle [in the night-time] is a trespass for which treble damages shall be recovered. By statute 4 & 5 W. & M. c. 23. to burn on any waste, between Candlemas and Midsummer, any grig, ling, heath, furze, goss, or fern, is punishable with whipping and confinement in the house of correction. (26) By statute 1 Ann. st. 2. c. 9. captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners, (and by 4 Geo. I. c. 12. to the prejudice of insurers also,) are guilty of felony without

(26) The object of this provision is the preservation of red and black game. See post, p. 247. st. 28 G. 2. c. 19.

benefit of clergy. (27) And by statute 12 Ann. st. 2. c. 18. making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offences, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy. By statute 1 Geo. I. c. 48. maliciously to set on fire any underwood, wood, or coppice, is made single felony. By statute 6 Geo. I. c. 23. the wilful and malicious tearing, cutting, spoiling, burning, or defacing of the garments or clothes of any person passing in the streets or highways, with intent so to do, is felony. This was occasioned by the insolence of certain weavers and others, who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or casting *aqua fortis* [245] in the streets upon such as wore them. By statute 9 Geo. I. c. 22. commonly called the Waltham black act, occasioned by the devastations committed near Waltham in Hampshire, by persons in disguise or with their faces blacked; (who seem to have resembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the first committed great outrages on the borders of England and Scotland[l];) by this black act, I say, which has in part been mentioned under the several heads of riots, menaces, mayhem, and larciny[m], it is farther

[l] 3 Inst. 197.

[m] See pag. 144. 208. 235. 240.

(27) The 43 G. 3. c. 113. repeals the provisions of 4 G. 1. c. 12., and makes it a capital felony, triable within a county if committed there, and if on the high seas, according to 28 Hen. 8. c. 15., wilfully to cast away, burn, or otherwise destroy any vessel, or to counsel the same to be done, if it be done accordingly, with intent maliciously to prejudice any owner of such vessel, or of any goods loaded on board, or any person, or body corporate, who shall have insured the ship, freight, or goods.

The 26 G. 2. c. 19. is a more general law on the subject matter of 12 Ann. st. 2. c. 18., and makes it capital in any person to plunder any effects belonging to any ship in distress, wrecked, lost, or stranded in any part of his majesty's dominions, (whether any living creature be on board such ship or not,) or any of the furniture, tackle, provision, or part of such ship; or to beat or wound with intent to kill, or otherwise wilfully to obstruct the escape of any person endeavouring to save his life from such ship; or to *hang out any false lights*, with intention to bring any ship into danger. *Where, however, goods of small value cast on shore are stolen with no circumstances* of cruelty, outrage, or violence, the offender may be prosecuted and punished as for petit larceny. See post, 304.

enacted, that to set fire to any house, barn, or out-house, (which is extended by statute 9 Geo. III. c. 29. to the malicious and wilful burning or setting fire to all kinds of mills,) or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or unlawfully and maliciously to break down the head of any fish-pond, whereby the fish shall be lost or destroyed; or in like manner to kill, maim, or wound any cattle; or cut down or destroy any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit; all these malicious acts, or procuring by gift or promise of reward any person to join them therein, are felonies without benefit of clergy; and the hundred shall be chargeable for the damages, unless the offender be convicted. (28) In like manner by the Roman law, to cut down trees, and especially vines, was punished in the same degree as robbery.[n] By statute 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is also made felony without the benefit of clergy, maliciously to cut down any river or sea-bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops, or wilfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or delph of coal. (29) By statute 11 Geo. II. c. 22. to use any violence in order to deter any person from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or sea-port; or to use any outrage with such intent; or to scatter,

[n] *Ff.* 47. 7. 2.

(28) As to fish-ponds and fish, and as to destroying trees, see pp. 4. 234, 235.; the maliciously killing, maiming, or wounding cattle is now punished in the same manner as the latter offence by the same statute 4 G. 4. c. 54. In all cases under the statutes of hue and cry, riot act, black act, and several subsequent statutes, in which the hundred is made liable for the damage sustained, the 3 G. 4. c. 33. gives a summary mode of recovering at a special petty sessions, and forbids the bringing any action against the hundred, where the damage does not exceed 30*l.*

(29) By the 13 G. 2. c. 21., which recites the statute of 10 G. 2. c. 32., and states that it is reasonable that an adequate punishment should likewise be inflicted on persons who shall wilfully and maliciously destroy or damage collieries by means of *water*, it is made an actionable matter, and visited with treble damages and full costs of suit, maliciously to divert or convey water into any coal mine, with design to destroy or damage any coal work, &c. The reader will not fail to remark the immense inequality of punishment awarded to the two offences of destroying by fire or water.

take away, spoil, or damage such grain or meal; is punished
[246] for the first offence with imprisonment and public whipping: and the second offence, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat, or vessel intended for exportation, is felony, subject to transportation for seven years. By statute 28 Geo. II. c. 19. to set fire to any goss, furze, or fern, growing in any forest or chase, is subject to a fine of five pounds. By statutes 6 Geo. III. c. 36. & 48., and 13 Geo. III. c. 33., wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, is for the two first offences liable to pecuniary penalties; and for the third, if in the day-time, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for seven years. By statute 9 Geo. III. c. 29. wilfully and maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine; or any fences for inclosures pursuant to any act of parliament, is made single felony and punishable with transportation for seven years, in the offender, his advisers, and procurers. And by statute 13 Geo. III. c. 38. the like punishment is inflicted on such as break into any house, &c. belonging to the plate-glass company with intent to steal, cut, or destroy, any of their stock or utensils, or wilfully and maliciously cut or destroy the same. And these are the principal punishments of malicious mischief. (30)

[247] III. Forgery, or the *crimen falsi*, is an offence, which was punished by the civil law with deportation or banishment, and sometimes with death[o]. It may with us be defined (at common law) to be, "the fraudulent making or alteration of a "writing to the prejudice of another man's right;" for which the offender may suffer fine, imprisonment, and pillory. And also by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are

[o] *Inst.* 4. 18. 7.

(30) Several statutes have been passed since the author's death for the protection of the buildings and machinery of different manufactures from malicious mischief; the 52 G. 3. c. 130. is a general act making it a capital felony maliciously to burn or set fire to any buildings, erections, or engines used in the carrying on any trade or manufactory, or in which any goods, wares, or merchandize are deposited.

so multiplied of late as almost to become general. I shall mention the principal instances. (31)

By statute 5 Eliz. c. 14. to forge or make, or knowingly to publish or give in evidence, any forged deed, court-roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages; by standing in the pillory, and having both the ears cut off, and the nostrils slit, and seared; by forfeiture to the crown of the profits of the offender's lands, and by perpetual imprisonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment: the second offence in both cases being felony without benefit of clergy.

Besides this general act, a multitude of others, since the revolution, (when paper-credit was first established,) have inflicted capital punishment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other

(31) This definition of forgery seems too confined, if by the words "to the prejudice, &c." it is intended to convey a notion that some one's right must actually be prejudiced by the forged writing; because it is clear that the offence is complete before publication of the instrument, and that it is enough if the counterfeiting be such whereby another may be prejudiced. East's P. C. c. xix. s. 7. In the short account which the author gives of this offence in the text, he principally confines himself to the cases in which forgery may be committed, and formidable as his list may appear, yet it may give the reader some idea how it might have been increased, to mention that Mr. Hammond, in the title Forgery of his Criminal Code, has enumerated more than 400 statutes which contain provisions against the offence. It would be in vain therefore to attempt to complete the author's sketch; and even upon far more important and general points which arise in the consideration of this offence, equally at common law and under the statutes, (such as, for example, the questions what false making, insertion, alteration, or erasure amounts to forgery; how far the validity in law of the thing forged, supposing it were a genuine instrument, is essential to forgery; and what degree of similarity must exist between the counterfeit and true instrument) I think it better to refer the student to East's P. C. c. xix., than to attempt to give an account within limits which must prevent its being satisfactory.

securities[q]; of bills of credit issued from the exchequer[r]; of South-sea bonds, &c.[s]; of lottery tickets or orders[t]; of army or navy debentures[u]; of East-India bonds[w]; of writings under the seal of the London, or royal exchange assurance[x]; of the hand of the receiver of the pre-fines[y]; or of the accountant-general and certain other officers of the court of chancery[z];
[249] of a letter of attorney or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends[a]; also on the personating, or procuring to be personated, any seaman or other person, entitled to wages or other naval emoluments, or any of his personal representatives; and the taking, or procuring to be taken, any false oath in order to obtain a probate, or letters of administration, in order to receive such payments; and the forging or procuring to be forged, and likewise the uttering, or publishing, as true, of any counterfeited seaman's will or power[b]: (32) to which may be added, though not strictly reducible to this head, the counterfeiting of Mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of Barbary[c]; the forging or imitating of any stamps to defraud the public revenue[d]; and the forging of any marriage-register or licence[e]; (33) all which are by distinct acts of parliament made felonies, without benefit of clergy. By statute 13 Geo. III. c. 52. and 59. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other

[q] Stat. 8 & 9 W. III. c. 20. § 36. 11 Geo. I. c. 9. 12 Geo. I. c. 32. 15 Geo. II. c. 13. 13 Geo. III. c. 79.
[r] See the several acts for issuing them.
[s] Stat. 9 Ann. c. 21. 6 Geo. I. c. 4. & 11. 12 Geo. I. c. 32.
[t] See the several acts for the lotteries.
[u] Stat. 5 Geo. I. c. 14. 9 Geo. I. c. 5.
[w] Stat. 12 Geo. I. c. 32.
[x] Stat. 6 Geo. I. c. 18.
[y] Stat. 32 Geo. II. c. 14.
[z] Stat. 12 Geo. I. c. 32.
[a] Stat. 8 Geo. I. c. 22. 9 Geo. I. c. 12. 31 Geo. II. c. 22. § 77.
[b] Stat. 31 Geo. II. c. 10. 9 Geo. III. c. 30.
[c] Stat. 4 Geo. II. c. 18.
[d] See the several stamp acts.
[e] Stat. 26 Geo. II. c. 33.

(32) The 57 G. 3. c. 127. consolidates the various statutes on this subject, and embraces all the cases of personation and forgery, to obtain wages, pay, prize-money, bounty-money, pension-money, or other allowances of money of any naval or marine officer, seaman, marine, &c., and makes them punishable capitally.

(33) See ante, p. 163. n. (3).

offences of the like tendency, are punished with transportation for fourteen years. By statute 12 Geo. III. c. 48. certain frauds on the stamp-duties, therein described, principally by using the same stamps more than once, are made single felony, and liable to transportation for seven years. And the same punishment is inflicted by statute 13 Geo. III. c. 38. on such as counterfeit the common seal of the corporation for manufacturing plate-glass, (thereby erected,) or knowingly demand money of the company by virtue of any writing under such counterfeit seal.

THERE are also certain other general laws, with regard to forgery; of which the first is 2 Geo. II. c. 25. whereby the first offence in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorsement, or assignment thereof, or any [250] acquittance or receipt for money or goods, with intention to defraud any person, (or corporation[f],) is made felony without benefit of clergy. And by statute 7 Geo. II. c. 22. and 18 Geo. III. c. 18. it is equally penal to forge or cause to be forged, or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or any other security for money; or any warrant or order for the payment of money, or delivery of goods. So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious person[g], is not made a capital crime.

THESE are the principal infringements of the rights of property: which were the last species of offences against individuals or private subjects, which the method of distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth: against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations, together with some of the more atrocious

[f] Stat. 31 Geo. II. c. 22. § 78. [g] Fost. 116, &c.

offences, of publicly pernicious consequence, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemesnors, with the punishment annexed to each, that are cognizable by the laws of England.

CHAPTER THE EIGHTEENTH.

OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch, or head, under which I proposed to consider the subject of this book of our commentaries; *viz.* the means of *preventing* the commission of crimes and misdemesnors. And really it is an honour, and almost a singular one to our English laws, that they furnish a title of this sort; since *preventive* justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice[a]; the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

THIS preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemesnors: but there also it must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment. And indeed, if we consider all human punishments in a large and extended view, we shall find them [252] all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter[b], all pu-

[a] Beccar. ch. 41.

[b] See pag. 11.

nishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example; all of which conduce to one and the same end, of preventing future crimes whether that can be effected by amendment, disability, or example. But the caution, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen: and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.

By the Saxon constitution these sureties were always at hand, by means of king Alfred's wise institution of decennaries or frankpledges; wherein, as has more than once been observed [c], the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct; of which we find mention in the laws of king Edward the confessor [d]; (1) "*tradat fidejussores de pace* "*et legalitate tuenda.*" Let us therefore consider, first, what this security is; next, who may take or demand it; and lastly, how it may be discharged.

1. This security consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required, (for instance 100*l.*) with condition to be void and of none effect, if the party shall appear in court on such a day, and in the mean time shall keep the
[253] peace; either generally, towards the king and all his liege people; or particularly also, with regard to the person, who

See Vol. I. pag. 114. *Cap.* 18.

(1) See Vol. I. p. 66.

craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, (or be of good behaviour,) either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Hen. VII. c. 1., and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance, becomes forfeited or absolute; and being *estreated* or extracted (taken out from among the other records), and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

2. ANY justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, as was mentioned in a former volume [e], may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shewn, provided such demandant be under the king's protection; for which reason it has been formerly doubted, whether jews, pagans, or persons convicted of a *præmunire* were entitled thereto [f]. Or, if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issuing out of the court of king's bench or chancery; which will compel the justice to act, as a ministerial and not as a judicial officer: and he must make a return to such writ, specifying his compliance, under his hand and seal [g]. But this writ is seldom used: for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8. And indeed a peer or peeress cannot be bound over in any other place, than the courts of king's bench or chancery: though a justice of the peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility, whether he be a fellow-justice or other magistrate, or whether he be merely a private man [h]. Wives may demand it against their husbands: or husbands,

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[e] See Vol. I. pag. 350.
[f] 1 Hawk. P.C. c. 60. § 2, 3.
[g] F. N. B. 80. 2 P. Wms. 202.
[h] 1 Hawk. P.C. c. 60. § 5.

if necessary, against their wives[i]. But feme coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments. (2)

3. A RECOGNIZANCE may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices, (as the quarter-sessions, assizes, or king's bench,) if they see sufficient cause: or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued[k].

THUS far what has been said is applicable to both species of recognizances, for the *peace*, and for the *good behaviour*: *de pace, et legalitate, tuenda*, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately: and first, shall shew for what cause such a recognizance, with sureties for the *peace*, is grantable; and then, how it may be forfeited.

1. ANY justice of the peace may, *ex officio*, bind all those to keep the peace, who in his presence make any affray; or threaten to kill or beat another; or contend together with
[255] hot and angry words: or go about with unusual weapons or attendance, to the terror of the people, and all such as he knows to be common barretors; and such as are brought

[i] 2 Stra. 1207. [k] 1 Hawk. P.C. c.60. § 17.

(2) The truth of the facts stated in the application is taken for granted, unless upon the face of it they appear manifestly to be false, and the party who is applied against is not at liberty by his own affidavit, or those of other persons, to contradict them and prove their falsehood. But as the application must be verified by oath, he has an opportunity of indicting the applicant for perjury, and if he succeeds in that prosecution, this will be a ground for the court to discharge the security. *R.* v. *Doherty*, 13 East's R. 171.

before him by the constable for a breach of peace in his presence; and all such persons as, having been before bound to the peace, have broken it and forfeited their recognizances [k]. Also, wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do; he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will shew that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also further swear, that he does not require such surety out of malice or for mere vexation [l]. This is called *swearing the peace* against another: and, if the party does not find such sureties, as the justice in his discretion shall require, he may be immediately committed till he does [m].

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance; or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book: or, by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance [n]. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance, (being looked upon to be merely the effect of unmeaning heat and passion,) unless they amount [256] to a challenge to fight [o].

The other species of recognizance, with sureties, is for the *good abearance* or *good behaviour*. This includes security for

[k] 1 Hawk. P.C. c. 60. § 1.
[l] *Ibid.* § 6, 7.
[m] *Ibid.* § 9.
[n] *Ibid.* § 25.
[o] *Ibid.* § 22.

the peace, and somewhat more: we will therefore examine it in the same manner as the other.

1. First, then, the justices are empowered by the statute 34 Ed. III. c. 1. to bind over to the good behaviour towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled or endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whore-masters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statutes as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties he must express the cause thereof with convenient certainty; and take care that such cause be a good one [p].

2. A recognizance for the good behaviour may be for-
[257] feited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen [q]:

[p] 1 Hawk. P. C. c. 61. § 2, 3, 4.

[q] *Ibid.* § 5, 6.

for, though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

CHAPTER THE NINETEENTH.

OF COURTS OF A CRIMINAL JURISDICTION.

THE sixth, and last, object of our inquiries will be the method of *inflicting* those *punishments*, which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which I shall pursue much the same general method that I followed in the preceding book, with regard to the redress of civil injuries: by, first, pointing out the several *courts* of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down, in their natural order, and explaining, the several *proceedings* therein.

First, then, in reckoning up the several *courts* of criminal jurisdiction, I shall, as in the former case, begin with an account of such, as are of a *public* and *general* jurisdiction throughout the whole realm; and, afterwards, proceed to such, as are only of a *private* and *special* jurisdiction, and confined to some particular parts of the kingdom.

I. In our inquiries into the criminal courts of *public* and *general* jurisdiction, I must in one respect pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and so ascend gradually to the courts of appeal, or those of the
[259] most extensive powers. But as it is contrary to the genius and spirit of the law of England, to suffer any man to be

tried twice for the same offence in a criminal way, especially if acquitted upon the first trial; therefore these criminal courts may be said to be all independent of each other; at least so far, as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial. And therefore as, in these courts of criminal cognizance, there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all; *viz.*

1. THE high court of *parliament;* which is the supreme court in the kingdom, not only for the making, but also for the execution of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom[a]. A commoner cannot however be impeached before the lords for any capital offence, but only for high misdemesnors[b]: a peer may be impeached for any

[a] 1 Hal. P. C. *150.

[b] When, in 4 Edw. III., the king demanded the earls, barons, and peers, to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their *peer*; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge, and to give judgment against him, the following protest and proviso was entered in the Parliament-roll: — "And it is assented "and accorded by our lord the king, and "all the great men, in full parliament, "that albeit the peers, as judges of the "parliament, have taken upon them in

crime. And they usually (in case of an impeachment of a peer for treason) address the crown to appoint a lord high steward for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king[c]; but it hath of late years been strenuously maintained[d], that the appointment of an high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords; who are in cases of misdemesnors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the antient Germans; who in their great councils sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen "capitis intendere*[e]." And it has a peculiar propriety in the English constitution; which has much improved upon the antient model imported hither from the continent. For though in general the union of the legislative and judicial powers ought to be more carefully avoided[f], yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or
[261] cannot punish. Of these the representatives of the people, or house of commons, cannot properly *judge*; because their constituents are the parties injured: and can therefore only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an ac-

"the presence of our lord the king to "make and render the said judgment, "yet the peers who now are, or shall be "in time to come, be not bound or charged "ed to render judgment upon others "than peers; nor that the peers of the "land have power to do this, but thereof "ought ever to be discharged and ac-"quitted; and that the aforesaid judg-"ment now rendered be not drawn to "example or consequence in time to "come, whereby the said peers may be "charged hereafter to judge others than "their peers, contrary to the laws of the "land, if the like case happen, which "God forbid." (*Rot. Parl. 4 Ed. III. n. 2. & 6.* 2 Brad. Hist. 190. Selden. judic. in parl. ch. 1.)

[c] 1 Hal. P.C. 350.

[d] Lords' Journ. 12 May 1679. Com. Journ. 15 May 1679. Fost. 142, &c.

[e] Tacit. *de mor. Germ.* 12.

[f] See Vol. I. pag. 269.

cuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring it's charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies[g]. This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were at the same time both judges and accusers. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby in the reign of Charles II.[h]; and it is now enacted by statute 12 & 13 W. III. c. 2. that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament[i]. (3)

[g] Montesq. Sp. L. xi. 6.
[h] Com. Journ. 5 May 1679.
[i] See ch. 31.

(3) In the case of the impeachment of Warren Hastings, it was determined that an impeachment did not abate by a dissolution of parliament. The high court of parliament was affirmed to exist at all times, and although from a dissolution or other causes it might not always be sitting to do justice, it was always open for the reception of appeals and writs of error. The peers, who were the judges (it was said), had their authority inherent in their order, and independent of the actual sitting of parliament; and the prosecutors were not merely the members of the house of commons, but all the commons of England, who though they might be deprived of their organ by a dissolution, did not thereby lose their right of acting, and might resume the exercise of that right as soon as they were furnished with a new organ by the assembling of a new parliament. It cannot be denied, on the one hand, that there are some difficulties in coming to this conclusion; but, on the other, it is certain that the right of impeachment would have lost half its value, if a contrary determination had been come to; and it seems also certain that, in former times, when the duration of a parliament seldom exceeded a month, impeachments must have been absolutely nugatory, if a dissolution had abated them. The debates on this interesting subject, which were very learned and able, may be seen very well summed up, and the determination itself learnedly advocated, in the Ann. Reg. for 1791. vol. xxxiii.

The student will not understand the stat. of W. III. as restraining the prerogative of the crown as to pardoning after judgment on an impeachment.

2. The court of the *lord high steward* of Great Britain[k] is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either[l]. The office of this great magistrate is very antient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit*: but now it is usually, and hath been for many centuries past[m], granted *pro hac vice* only; and it hath been the constant practice (and therefore seems now to have become necessary) to grant it to
[262] a lord of parliament, else he is incapable to try such delinquent peer[n]. When such an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the assises before the justices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as *guilty* or *not guilty*, of the indictment; but only in this court: because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king therefore, in case a peer be indicted for treason, felony, or misprision, creates a lord high steward *pro hac vice* by commission under the great seal; which recites the indictment so found, and gives his grace power to receive and try it, *secundum legem et consuetudinem Angliae*. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite; and the custom was, for the lord high steward to summon as many as he thought proper, (but of

[k] 4 Inst. 58. 2 Hawk. P. C. c. 2. § 1. c. 44. § 1. 2 Jon. 54.

[l] 1 Bulstr. 198.

[m] Pryn. on 4 Inst. 46.

[n] *Quand un* seigneur de parlement *serra arrein de treason ou felony, le roy par ses lettres patents fera un grand et sage* seigneur *d'estre le grand seneschal d'Angleterre; qui — doit faire un precept — pur faire venir xx* seigneurs, *ou xviii, &c.* (Yearb. 13 *Hen. VIII.* 11.) See Staundf. P. C. 152. 3 Inst. 28. 4 Inst. 59. 2 Hawk. P. C. c. 2. § 1. Barr. 234. 287. 4th Ed. contra.

late years not less than twenty-three[o] (4),) and that those lords only should sit upon the trial: which threw a monstrous weight of power into the hands of the crown, and this it's great officer, of selecting only such peers as the then predominant party should most approve of. And accordingly, when the earl of Clarendon fell into disgrace with Charles II., there was a design formed to prorogue the parliament, in [263] order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court.[p] But now by statute 7 W. III. c. 3. upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery.

During the session of parliament the trial of an indicted peer is not properly in the court of the lord high-steward, but before the court last mentioned, of our lord the *king in parliament*.[q] It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings: but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial.[r] Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges[s], that in case the day appointed in the judgment

[o] Kelynge. 56.
[p] Carte's life of Ormonde, Vol. II.
[q] Fost. 141.
[r] State Trials, Vol. IV. 214, 232, 3.
[s] Fost. 139.

(4) "Because that is the least number to be sure of twelve to be of one mind;" and though the verdict is by the majority, yet that majority must consist of twelve at the least. Kelynge. 56.

for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament during it's sitting, though no high steward be existing; or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

[264] It has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of king William, "all peers, who have a right to "sit and vote in parliament:" but the expression had been much clearer, if it had been, "all *lords*," and not, "all *peers*;" for though bishops, on account of the baronies annexed to their bishopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II., they are expressly excused, rather than excluded, from sitting and voting in trials, when they come to concern life or limb: "*episcopi sicut caeteri barones, debent* "*interesse judiciis cum baronibus, quousque perveniatur ad dimi-* "*nutionem membrorum, vel ad mortem:*" and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law,) but of the general rule, that compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby's case[t], which hath ever since been adhered to, is consonant to these constitutions; "that the lords spiritual have a right to stay and sit in "court in capital cases, till the court proceeds to the vote of "guilty, or not guilty." It must be noted, that this resolution extends only to trials *in full parliament*: for to the court of the lord high steward (in which no vote can be given, but merely

[t] Lords' Journ. 15 May 1679.

that of guilty, or not guilty,) no bishop, as such, ever was or could be summoned; and though the statute of king William regulates the proceedings in that court, as well as in the [265] court of parliament, yet it never intended to new-model or alter it's constitution; and consequently does not give the lords spiritual any right in cases of blood which they had not before[u]. And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the lord high steward[w], and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house: as appears from the trials of popish lords, of lords under age, and (since the union) of the Scots nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager, and of all peeresses by birth; and peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband. (5)

3. The court of *king's bench*[x], concerning the nature of which we partly inquired in the preceding book[y], was (we may remember) divided into a *crown* side, and a *plea* side. And on the crown side, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemesnor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius*, by a jury of the county out of which the indictment is brought. (6) The judges of this court are the supreme

[u] Fost. 248.
[w] Bro. *Abr. t. Trial.* 142.
[x] 4 Inst. 70. 2 Hal. P. C. 2. 2 Hawk. P. C. 6.
[y] See Vol. III. pag. 41.

(5) See Vol. I. p. 401.

(6) The court of king's bench possesses the power in all cases where it appears that an impartial trial cannot be had in the county out of which the indictment is brought, to direct the trial to be had in some other county. And by the 38 G. 3. c. 52. it is provided, that in all indictments removed into the king's bench by *certiorari*, and in all informations filed there, if the venue be laid in any city or town corporate, the court, at the instance of the prosecutor or defendant, may, if it think proper, direct the issue to be tried by a jury of the next adjoining county. London, Westminster, Southwark, Bristol, and Chester are entirely exempted from the operation of this act; and Exeter, except in case of indictments removed by *certiorari*.

coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the sickness in 1665,) all former commissions of *oyer* and *terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto*: in the same manner as by the old Gothic
[266] and Saxon constitutions, "*jure vetusto obtinuit, quievisse omnia* "*inferiora judicia, dicente jus rege*[z]." (7)

Into this court of king's bench hath reverted all that was good and salutary of the jurisdiction of the court of *star-chamber, camera stellata*[a]: which was a court of very antient

[z] Stiernhook, *l.* 1. *c.* 2.

[a] This is said (Lamb. *Arch.* 154.) to have been so called, either from the Saxon word ꝼꞇeoꞃan, to *steer* or govern; — or from its punishing the *crimen stellionatus*, or cosenage; — or because the room wherein it sate, the old council-chamber of the palace of Westminster, (Lamb. 148.) which is now converted into the lottery-office, and forms the eastern side of New Palace-yard, was full of windows; — or (to which sir Edward Coke, 4 Inst. 66. accedes) because *haply* the roof thereof was at the first garnished with gilded *stars*. As all these are merely conjectures, (for no stars are now in the roof, nor are any said to have remained there so late as the reign of queen Elizabeth,) it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that before the banishment of the Jews under Edward I. their contracts and obligations were denominated in our antient records *starra* or *starrs*, from a corruption of the Hebrew word *shetàr*, a covenant, (Tovey's *Angl. judaic.* 32. Selden, tit. of hon. ii. 34. *Uxor. Ebraic.* i. 14.) These starrs, by an ordinance of Richard the first, preserved by Hoveden, were commanded to be enrolled and deposited in chests, under three keys in certain places; one, and the most considerable, of which was in the king's exchequer at Westminster; and no starr was allowed to be valid un-

(7) Lord Hale observes, that the king's bench by coming into any county does not determine any other commission, but suspends its session during the term, and that in vacation-time the commissioners may proceed again upon their former commission. A special commission, he observes also, may sit in term-time in the county where the king's bench sits, but then the king's bench must adjourn during its session. 2 Hal. P. C. 4. See also 2 Hawk. P. C. c. 5. s. 3. to the same effect.

And the 25 G. 3. c. 18. has provided that the session of oyer and terminer and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall not be discontinued by the sitting of the king's bench at Westminster in term. The 32 G. 3. c. 48. has made a similar provision for the sessions of the peace and of oyer and terminer, before the justices of the peace for the same county.

original[b], but new-modelled by statutes 3 Hen. VII. c. 1. and 21 Hen. VIII. c. 20. consisting of divers lords spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemesnors, contrary to the laws of the land. Yet, this was afterwards, (as lord Clarendon inform us[c]) stretched "to the asserting "of all proclamations, and orders of state: to the vindicating "of illegal commissions, and grants of monopolies; holding "for honourable that which pleased, and for just that which "profited, and becoming both a court of law to determine "civil rights, and a court of revenue to enrich the treasury; "the council table by proclamations enjoining to the people "that which was not enjoined by the laws, and prohibiting "that which was not prohibited; and the star-chamber, which "consisted of the same persons in different rooms, censuring "the breach and disobedience to those proclamations by very "great fines, imprisonments, and corporal severities: so that "any disrespect to any acts of state, or to the persons of "statesmen, was in no time more penal, and the foundations "of right never more in danger to be destroyed." For which reasons it was finally abolished by statute 16 Car. I. c. 10. to the general joy of the whole nation[d].

less it were found in some of the said repositories. (*Memorand. in Scacc. P.* 6 *Edw. I.* prefixed to Maynard's year-book of Edw. II. fol. 8. Madox, hist. exch. c. vii. § 4, 5, 6.) The room at the exchequer, where the chests containing these starrs were kept, was probably called the *starr-chamber*: and when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the starr-chamber is mentioned in any record, it is said to have been situated near the receipt of the exchequer at Westminster; (the king's council, his chancellor, treasurer, justices, and other sages, were assembled *en la chaumbre des esteiles pres la resceipt la Westminster.* — *Claus.* 41. *Edw. III. m.* 13.) For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law-french, *la chaumbre des esteilles*, and in law-latin *camera stellata*; which continued to be the style in latin till the dissolution of that court.

[b] Lamb. *Arch.* 156.

[c] Hist. of Reb., book 1 and 3.

[d] The just odium into which this tribunal had fallen before it's dissolution, has been the occasion that few memorials have reached us of it's nature, jurisdiction, and practice; except such as, on account of their enormous oppression are recorded in the histories of the times. There, are, however, to be met with some reports of it's proceedings in Dyer, Croke, Coke, and other reporters of that age, and some in ma-

4. The court of *chivalry*[e], of which we also formerly spoke[f] as a military court, or court of honour, when held before the earl marshal only, is also a criminal court, when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of it's authority, is fallen into entire disuse: there having been no permanent high constable of England (but only *pro hac vice* at coronations and the like) since the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII.; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief justice Fineux was asked by king Henry the eighth, how far they extended, he declined answering; and said, the decision of that question belonged to the law of arms, and not to the law of England[g].

5. The high court of *admiralty*[h], held before the lord high admiral of England, or his deputy, stiled the judge of the admiralty, is not only a court of civil but also of criminal jurisdiction. This court hath cognizance of all crimes and offences committed either upon the sea, or on the coasts, out of the body or extent of any English county; and by statute 15 Ric. II. c. 3. of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction there was contrary to the genius of the law of England; inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And

nuscript, of which the author hath two; one from 40 Eliz. to 13 Jac. I., the other for the first three years of king Charles: and there is in the British Museum (Harl. MSS. Vol. I. N° 1226) a very full, methodical, and accurate account of the constitution and course of this court, compiled by William Hudson of Gray's Inn, an eminent practitioner therein (8): and a short account of the same, with copies of all it's process, may also be found in 18 Rym. *Foed.* 192. &c.

[e] 4 Inst. 123. 2 Hawk. P. C. c. 4.

[f] See Vol. III. pag. 68.

[g] Duck. *de authorit. jur. civ.*

[h] 4 Inst. 134. 147.

(8) This is now published in the second volume of the *Collectanea Juridica.*

besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment: for the rule of the civil [269] law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to the English nation; and therefore in the eighth year of Henry VI. it was endeavoured to apply a remedy in parliament: which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15. it was enacted, that these offences should be tried by commissioners of *oyer* and *terminer*, under the king's great seal; namely, the admiral or his deputy, and three or four more; (among whom two common law judges are usually appointed;) the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the course of proceedings should be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty still presiding therein, as the lord mayor is the president of the session of *oyer* and *terminer* in London. (9)

THESE five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species are,

6, 7. THE courts of *oyer* and *terminer*, and general *gaol delivery*[1]: which are held before the king's commissioners,

[1] 4 Inst. 162. 168. 2 Hal. P.C. pp. 22. 32. 2 Hawk. P.C. cc. 5, 6.

(9) The 27 H. 8. c. 4. extended only to the offences of piracy, robbery, murder, and manslaughter; the 28 H. 8. c. 15. embraces treasons, felonies, robberies, murders, and confederacies; but the 39 G. 3. c. 37. enacts, that all offences committed on the high seas out of the body of any county, shall be enquired of under the commission described in the text. And the 46 G. 3. c. 54. enables the king to issue a similar commission to any such four persons as the lord chancellor shall approve of for trying such offences, in the same manner, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories.

among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. (10) These were slightly mentioned in the preceding book [k]. We then observed, that, at what is usually called the assises, the judges sit by virtue of five several authorities: two of which, the commission of *assise* and it's attendant juris-
[270] diction of *nisi prius*, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases [l]. The third, which is the commission of the *peace*, was also treated of in a former volume [m], when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assises are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c. and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer* and *terminer* [n], to hear and determine all treasons, felonies, and misdemesnors. This is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assises; for they must first inquire by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. Therefore they have, besides, fifthly, a commission of general *gaol delivery* [o]; which empowers them to try and deliver every prisoner, who shall be in the gaol

[k] See Vol. III. pag. 60.
[l] 2 Hal. P.C. 39. 2 Hawk. P.C. c. 7.
[m] See Vol. I. pag. 351.
[n] See Appendix, § 1.
[o] *Ibid.*

(10) It has been usual lately to hold the courts of oyer and terminer and general gaol delivery twice in the year in the four northern counties, and three times in the counties which form the home circuit.

when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was anciently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo* [p]: but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and excellence. Sometimes also, upon urgent [271] occasions, the king issues a special or extraordinary commission of *oyer* and *terminer*, and *gaol delivery*, confined to those offences which stand in need of immediate inquiry and punishment: upon which the course of proceeding is much the same, as upon general and ordinary commissions. Formerly it was held, in pursuance of the statutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no judge or other lawyer could act in the commission of *oyer* and *terminer*, or in that of gaol delivery, within his own county where he was born or inhabited; in like manner as they are prohibited from being judges of assise and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemesnors, than in matters of property and disputes between party and party, it was thought proper by the statute 12 Geo. II. c. 27. to allow any man to be a justice of *oyer* and *terminer* and general gaol delivery within any county of England. (11)

8. The court of general *quarter sessions* of the peace [q] is a court that must be held in every county once in every quarter of a year; which by statute 2 Hen. V. c. 4. is appointed to be in the first week after michaelmas-day; the first week after the epiphany; the first week after the close of easter; and in the week after the translation of St. Thomas the martyr, or the seventh of July. (12) It is held before two or more jus-

[p] 2 Inst. 43. [q] 4 Inst. 170. 2 Hal. P.C. 42. 2 Hawk. P.C. c. 8.

(11) See Vol. III. p. 60. n. 18.

(12) By the 54 G. 3. c. 84. the Michaelmas quarter sessions are directed to be holden in the first week after the 11th of October. And for the more speedy dispatch of business the 59 G. 3. c. 28. has empowered the court, whenever

tices of the peace, one of whom must be of the *quorum*. The jurisdiction of this court, by statute 34 Edw. III. c. 1., extends to the trying and determining all felonies and trespasses whatsoever: though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy; their commission providing, that if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the court of king's bench or common pleas, or one of the judges of assize. And therefore murders, and other capital felonies, are usually remitted for a
[272] more solemn trial to the assises. They cannot also try any new-created offence, without express power given them by the statute which creates it [r].(13) But there are many offences and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court; as the smaller misdemesnors against the public or common wealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision for the poor, vagrants, servants' wages, apprentices, and popish recusants [s]. Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of king's bench, by a writ of *certiorari facias*, and be there either quashed or confirmed. The records or rolls of the sessions are committed to the cus-

[r] 4 Mod. 379. Salk. 406. Lord Raym. 1144.

[s] See Lambard *eirenarcha* and Burn's Justice.

whenever the business seems likely to occupy more than three days, including the day of assembly, to select two or more justices, one being of the quorum, who shall sit apart and proceed with the matters allotted to them, at the same time that the court is disposing of the remainder of the business.

(13) Justices of the peace derive their power partly from the king's commission, and partly from several statutes: the former gives them jurisdiction in all common law offences, which involve or tend to an actual breach of the peace; the latter, of course, extend only to the cases which they severally provide for. Thus they may under their commission try the offence of libel, because that has a manifest tendency to actual breach of the peace: perjury at common law they cannot, because that produces only a constructive breach; but perjury under the statute of 5 Eliz. c. 9. they can, because that statute, § 9., expressly gives the power.

tody of a special officer denominated the *custos rotulorum*, who is always a justice of the *quorum*; and among them of the *quorum* (saith Lambard [s]) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the *custos rotulorum*, (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for money [t].

In most corporation towns there are quarter-sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by staute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is sometimes kept a special or petty session, by a few justices, for dispatching smaller [273] business in the neighbourhood between the times of the general sessions; as, for licensing alehouses, passing the accounts of the parish officers, and the like. (14)

[s] b. 4. c. 3.

[t] Stat. 37 Hen. VIII. c. 1. 1 W. & M. st. 1. c. 21.

(12) The author speaks of a special or petty session, as if they meant the same thing, which is not the case. Every county is divided into certain divisions, and though the legal qualities of a division are not very well ascertained, yet the thing itself is recognised by a great number of acts of parliament, and is for practical purposes sufficiently defined. The justices residing in each division, although their commission undoubtedly extends over the whole county, yet, except at general or quarter sessions, ordinarily confine themselves to matters arising within the division. Within this limit they have generally one or more stated places where they meet at certain stated times, monthly or oftener, as the public business may ordinarily require, and there they transact all such affairs of a summary nature as by law require the presence of more than one justice, and yet need not be done at a general quarter or special sessions. These meetings are properly petty sessions, and as they are held at fixed times and places, no notice is necessary for the assembling of them. It is a mistake, however, to suppose, though the notion of a division may not be very clearly ascertained in law, and the powers of the magistrates there are thus limited, that any two or more justices may at this day, of their own authority, subdivide an existing

9. The *sheriff's tourn*[u], or rotation, is a court of record, held twice every year within a month after easter and michaelmas, before the sheriff, in different parts of the county; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred[w]: This therefore is the great court-leet of the county, as the county-court is the court-baron: for out of this, for the ease of the sheriff, was it taken.

10. The *court-leet*, or *view of frankpledge*[x], which is a court of record, held once in the year and not oftener[y], within a particular hundred, lordship, or manor, before the steward of the leet: being the king's court granted by charter to the lords of those hundreds or manors. Its original intent was to view the frankpledges, that is, the freemen within the liberty; who, (we may remember[z],) according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court-leet and the sheriff's tourn; which have exactly the same jurisdiction, one being only a larger species of the other; extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein; which commorancy consists in usually lying there: a regulation, which owes its original to the laws of king Canute[a]. But persons under twelve and above sixty years old, peers, clergymen, women, and the king's tenants in ancient demesne, are excused from attend-

[u] 4 Inst. 259. 2 Hal. P. C. 69. 2 Hawk. P.C. c.10.
[w] Mir. c. 1. § 13. and 16.
[x] 4 Inst.261. 2 Hawk. P.C. c.11.
[y] Mirror, c. 1. § 10.
[z] See Vol. I. pag.113.
[a] *part* 2. c. 19.

ing division, and establish a petty session; things ordered by law to be done at petty sessions, would not be legally done at such a meeting. *R.* v. *Justices of Devon*, 1 B. & A. 586. Special sessions are meetings held by the justices of a division for some especial purpose, by notice specifying the time, and place, and purpose. These are held in pursuance of sundry statutes directing particular things (the diversion of highways, for instance) to be done at such meetings. As the time and place of these meetings are occasional, and vary with the object, a reasonable notice to all the magistrates of the division is necessary to render the orders made there valid. See *R.* v. *Justices of Worcestershire*, 2 B. & A. 228.

ance there: all others being bound to appear upon the jury, if required, and make their due presentments. It was also antiently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to [274] come to the court-leet, and there take the oath of allegiance to the king. The other general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction; and not only to present, but also to punish, all trivial misdemesnors, as all trivial debts were recoverable in the court-baron, and county-court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our antient constitution. Thus in the Gothic constitution, the *haereda*, which answered to our court-leet, "*de omnibus quidem cognoscit, non tamen de "omnibus judicat*[b]." The objects of their jurisdiction are therefore unavoidably very numerous: being such as in some degree, either less or more, affect the public weal, or good governance of the district in which they arise; from common nusances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. III. c. 10., to all prelates, peers, and clergymen, from their attendance upon these courts; which occasioned them to grow into disrepute. And hence it is that their business hath for the most part gradually devolved upon the quarter-sessions; which [in respect to the sheriff's tourn] it is particularly directed to do in some cases by statute 1 Edw. IV. c. 2.

11. The court of the *coroners*[c] is also a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis*. Of the coroner and his office we treated at large in a former volume[d], among the public officers and ministers of the kingdom; and therefore shall not here repeat our inquiries; only mentioning his

[b] Stiernh. *de jur. Goth. l.* 1. *c.* 2.
[c] 4 Inst. 271. 2 Hal. P. C. 53. 2 Hawk. P.C. c. 9.
[d] See Vol. I. pag. 346.

court, by way of regularity, among the criminal courts of the nation.

[275] 12. The court of the *clerk of the market*[e] is incident to every fair and market in the kingdom, to punish misdemesnors therein; as a court of *pie poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction[f] is principally the cognizance of weights and measures, to try whether they be according to the true standard thereof, or no: which standard was antiently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though now usually a layman, is called the *clerk* of the market[g]. If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom: though the objects of its coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the curule aediles.

II. There are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places, which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own for the punishment of crimes and misdemesnors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I speak not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animae*; or, which is looked upon as equivalent to all the rest, by a sum of money

[e] Inst. 273.
[f] Bacon of English Gov. b. x. c. 8.
[g] See st. 17 Car. II. c. 19. 22 Car. II. c. 8. 23 Car. II. c. 12.

to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book[h]. I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. AND, first, the court of the *lord steward, treasurer*, or *comptroller* of the king's *household*[i], was instituted by statute 3 Hen. VII. c. 14. to inquire of felony by any of the king's sworn servants, in the cheque roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men, (that is, sober and discreet persons,) of the king's household.

2. THE court of the *lord steward* of the king's *household*, or (in his absence) of the treasurer, comptroller, and steward of the *marshalsea*[k], was erected by statute 33 Hen. VIII. c. 12. with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings whereby blood shall be shed in, or within the limits, (that is, within two hundred feet from the gate,) of any of the palaces and houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, are very minutely set forth in the said statute 33 Hen. VIII., and the several officers of the servants of the household in and about such execution are described; from the serjeant of the wood-yard, [277] who furnishes the chopping block, to the serjeant-farrier, who brings hot irons to scar the stump. (15)

h See Vol. III. p. 61.
i 4 Inst. 133. 3 Inst. 37.
k 4 Inst. 133. 2 Hal. P. C. 7.

(15) Lord Hale observes, that the power of this court to try treasons is wholly

3. As in the preceding book[1] we mentioned the courts of the two universities, or their chancellors' courts, for the redress of civil injuries: it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a similar jurisdiction) hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdemesnors under the degree of treason, felony, or mayhem. (16) The prohibition of meddling with freehold still continues: but the trial of treason, felony, and mayhem, by a particular charter, is committed to the university-jurisdiction in another court, namely, the court of the *lord high steward* of the university.

For by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the rest, by the statute 13 Eliz. c. 29.) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony, and mayhem, which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land, and the privileges of the said univer-
[278] sity. When therefore an indictment is found at the assises, or elsewhere, against any scholar of the university, or other privileged person, the vice chancellor may claim the cogniz-

[1] See Vol. III. pag. 83.

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wholly taken away by the 1 & 2 Ph. & M. c. 10.; and also that the act being affirmative, neither excluded the jurisdiction of the king's bench, or of the ordinary commissioners of oyer and terminer, or of the commissioners of oyer and terminer specially appointed for felonies and treasons within the verge. In consequence of all which, he says, he had never heard of a single session under the statute until the very year in which he was writing. 2 H. P. C. p. 9.

(16) See Vol. III. p. 85. n. 11.

ance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of assise: and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed: for I take it that the high steward cannot proceed originally *ad inquirendum;* but only, after inquest in the common law courts, *ad audiendum et determinandum.* Much in the same manner, as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assises, or in the court of king's bench, and then (in consequence of a writ of *certiorari*) transmitted to be finally heard and determined before his grace the lord high steward and the peers.

When the cognizance is so allowed, if the offence be *inter minora crimina,* or a misdemesnor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this: The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes:*" and by a jury formed *de medietate,* half of freeholders and half of matriculated persons, is the indictment to be tried; and that in the Guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university-process; to which he is annually bound by an oath.

I have been the more minute in describing these proceed- [279]
ings, as there has happily been no occasion to reduce them into practice for more than a century past; nor will it perhaps ever be thought advisable to revive them: though it is not a right that merely rests *in scriptis* or theory, but has formerly often been carried into execution. There are many instances, one in the reign of queen Elizabeth, two in that of James the first, and two in that of Charles the first, where indictments for murder have been challenged by the vice-chancellor

at the assises, and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriff's and bedell's panels, and all the other proceedings on the trial of the several indictments, are still extant in the archives of that university.

CHAPTER THE TWENTIETH.

OF SUMMARY CONVICTIONS.

WE are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds; *summary* and *regular*: of the former of which I shall briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

By a *summary* proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence. But it has of late been so far extended, as, if a check [281] be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases. For,

I. Of this summary nature are all trials of offences and frauds contrary to the laws of the *excise*, and other branches

of the *revenue*: which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removable at the discretion of the crown. And though such convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expence and delay of frequent prosecutions by action or indictment; and though such has usually been the *conduct* of the commissioners, as seldom (if ever) to afford just grounds to complain of oppression; yet when we again [a] consider the various and almost innumerable branches of this revenue; which may be in their turns the subjects of fraud, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction; we shall find that the *power* of these officers of the crown over the property of the people is increased to a very formidable height. (1)

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties denounced by act of parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited [b], and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath however had some mischievous effects; as, 1. The almost entire disuse and contempt of the court-leet, and sheriff's-tourn, the king's antient courts of
[282] common law, formerly much revered and respected. 2. The

[a] See Vol. I. p. 319, &c. [b] Lambard and Burn.

(1) Formidable as the summary power is, which the legislature has entrusted to commissioners and justices of the peace, in respect of the excise and other revenue laws, this sentence overstates it considerably, being so expressed as to convey an idea that all offences against those laws are within this summary jurisdiction. The fact is, that a very large number of offences against them are triable only upon information and indictment before the constitutional tribunal of the jury; and I believe (though in such a number of statutes it is not safe to speak with too much confidence), that no offence is triable summarily, of which the direct punishment can be corporal, imprisonment, or transportation.

burthensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehension that the duty of their office will take up too much of that time, which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if *all* gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals: which would remove what in the present scarcity of magistrates is really an objection so formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of,

3. A third mischief: which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our antient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our antient constitution, by ordaining new penalties to be inflicted upon summary convictions.

THE process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before he is condemned. This is now held to be an indispensable requisite[c]; though [283] the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

[c] Salk. 181. 2 Lord Raym. 1405.

" *Qui statuit aliquid, parte inaudita altera,*
" *Aequum licet statuerit, haud aequus fuit:*"

a rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least: and our own common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred, by distress and sale of his goods. This is, in general, the method of summary proceedings before a justice or justices of the peace; but for particulars we must have recourse to the several statutes, which create the offence, or inflict the punishment; and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall of course under the general rule, and can only be convicted by indictment or information at the common law. (2)

(2) In speaking of summary convictions by justices, it should not be lost sight of that in a great, perhaps the greater number of cases, an appeal lies from the justices to the quarter sessions or other courts, in which case the merits may be re-considered, and the same or fresh evidence be heard for and against the judgment; nor that in all cases a conviction may be removed into the court of king's bench by *certiorari*, unless the statute under which it is framed expressly provides to the contrary. When it is thus brought under review, as it proceeds from a jurisdiction at once extraordinary and circumscribed, the court will presume nothing in its favour, but every thing requisite to make it valid must appear upon its face. There is no doubt that this rule, which has been adhered to with laudable strictness from the proper jealousy entertained of these summary proceedings, has in many cases led to the quashing of convictions for defects of form, in which justice had been substantially done below. The legislature, therefore, has lately interfered, and by 3 G. 4. c. 23. given a form of conviction to be used in all cases in which previous statutes do not direct some other; and further enacted, that in all cases in which it shall appear by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and in which the defendant has not appealed if he might, or the conviction been affirmed on

III. To this head, of summary proceedings, may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon.

THE contempts, that are thus punished, are either *direct*, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are *consequential*, which (without such gross insolence or direct opposition) [284] plainly tend to create an universal disregard of their authority. The principal instances, of either sort, that have been usually [d] punishable by attachment, are chiefly of the following kinds. 1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are entrusted to their distribution: or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like. For, as the king's superior courts (and especially the court of king's bench) have a general superintendance over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attornies and solicitors, who are also officers of the respective courts: by

[d] 2 Hawk. P. C. c. 22.

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on appeal, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal one as will be agreeable to the justice of the case.

This statute seems to put the law as to convictions on a right footing; it is not proper that any thing, even if objectionable in principle, should in courts of justice be met by astute and cavilling constructions; on the other hand, no favour should be shewn to loose and incorrect proceedings; and the statute, by leaving it to the judges to distinguish between formal and substantial defects, and protecting the former only, has preserved untouched to them their constitutional power of watching over and restraining the proceedings of the inferior magistrates.

gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the mal-practice of the officers reflects some dishonour on their employers: and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office: such as making default, when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviours or irregularities of a similar kind: but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit, or proceeding before the court: as by disobedience to
[285] any rule or order, made in the progress of a cause; by non-payment of costs awarded by the court upon a motion; or by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination [e]. Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. (3) And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon. And upon a similar principle, obedience to any rule of court may also by statute 10 Geo. III. c. 50. be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any other persons under the degree of a peer: and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like [f]; or when they import a disobedience

See Vol. III. pag. 17.

[f] Styl 277. 2 Hawk. P. C. c. 22. s. 33. Cro Jac. 419. Salk. 586.

(3) And therefore the different acts for the relief of insolvent debtors and others from imprisonment extend to persons in custody for contempts of this kind. See Vol. III. p. 416. (n. 7.)

to the king's great prerogative writs of prohibition, *habeas corpus* [s], and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication: by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any thing, in short, that demonstrates a gross [286] want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people. (4)

[s] 1 Burr. 632. Lord's Journ. 7 Feb. 8 Jun. 1757.

(4) The question of the legality of publishing true statements of the proceedings of courts of justice has naturally excited much attention. In principle it is not a very difficult one. The public good is the final, and the advancement of justice the secondary end of all courts of justice; and both reason and experience shew that the giving full publicity to their proceedings tends very strongly to make them answer both these ends. It will follow, therefore, as a general rule, that publication of their proceedings is lawful. But reason and experience also shew that, under certain circumstances, publicity may defeat those ends; whenever, therefore, these occur, it will, upon the same principle, be unlawful. Tried by this test, it seems that the publication of all preliminary or unfinished proceedings must be unlawful, because they present a partial statement, and pre-occupy unfairly the minds of those out of whom are to be selected the ultimate judges of the case; in so doing it is clear that they pervert, instead of advancing justice, and therefore must obstruct the public good. Much undoubtedly may be said in favour of the publication of preliminary proceedings before justices of the peace; the strength of the argument, however, must rest on the check which it imposes upon any corrupt or arbitrary practices by them. But when, on the one hand, it is considered how many checks a justice of the peace would still act under, even were this removed; and, on the other, that no misconduct which he can be guilty of in this way, whether it be in wrongfully committing, bailing, or discharging, is ever final; there will still remain a great balance of public convenience in favour of repressing such publication.

Another case to which the same test may be applied, and where the same conclusion will follow with less question, is, where the proceedings relate to

The process of attachment, for these and the like contempts, must necessarily be as antient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend. And though a very learned author[h] seems inclinable to derive this process from the statute of Westm. 2. 13 Edw. I. c. 39. (which ordains, that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a qua non deliberentur sine* "*speciali praecepto domini regis:*" and if the sheriff himself

[h] Gilb. Hist. C. P. ch. 3.

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to blasphemous or indecent matter. For the purposes of justice, very offensive evidence must often be heard on trials, the publication of which afterwards for general circulation can produce little but unmixed evil. A more doubtful case has been suggested by Lord Ellenborough, who seems to have thought that it might be unlawful "wantonly to publish circumstances distressing to the feelings of individuals on whom they reflected." *Stiles* v. *Nokes*, 7 East's R. 503. Now there is some difficulty in determining legally what is a wanton publication: trials are commonly published rather for the sake of individual gain, than for the public advantage, and the law must regard the general result, not the individual motive. If, too, the distress of the party reflected on be a ground for silence, it is probable that the very cases which it is most important to publish would be brought within this exception.

The determination of what cases fall within the rule, and what within the exception, must necessarily be left to the courts of law, whether the question arises on the complaint of an individual in a civil action for damages, or is taken up by the court itself as a contempt of its jurisdiction. In the first case, it is not distinguishable in kind from any other question between two parties, falling within their ordinary cognisance; in the latter, in which the court may seem to have more of a personal interest, it must be remembered that the judges are but trustees of their powers for great public purposes; that in the execution of that trust reason and necessity both require that some confidence should be placed in them; and, finally, that whether they punish by fine or imprisonment, the legality of the one may be questioned in the court of exchequer, and that of the other by a writ of *habeas corpus* before any other of the superior courts of the country. See *R.* v. *Fleet*. 1 B. & A. 379. *R.* v. *Clements*. 4 B. & A. 218.

be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, commanders, and favourers, and by a special writ judicial they shall be *attached* by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever,) yet he afterwards more justly concludes, that it is a part of the *law of the land*; and, as such, is *confirmed* by the statute of *magna charta*.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges[i], without any farther proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on [287] the suspected party to shew cause why an attachment should not issue against him[j]; or, in very flagrant instances of contempt, the attachment issues in the first instance[k]; as it also does, if no sufficient cause be shewn to discharge, and thereupon the court confirms, and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days[l]: and if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out[m]. If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury[n]. If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment[o]. If the contempt be of such a

[i] Staund. P. C. 73. *b*.
[j] Styl. 277.
[k] Salk. 84. Stra. 185. 564.
[l] 6 Mod. 73.
[m] Stra. 444.
[n] 6 Mod. 73.
[o] Cro. Car. 146.

nature, that, when the fact is once acknowledged, the court can receive no farther information by interrogatories than it is already possessed of (as in the case of a *rescous*[p],) the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any interrogatories: but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court. (5)

It cannot have escaped the attention of the reader, that this method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common
[288] law in any other instance[q]; and seems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a process of contempt; acting only *in personam* and not *in rem*. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard

[p] The King *v.* Elkins, M. 3 Geo. III. B. R. 4 Burr. 2129.

[q] See Vol. III. p. 100, 101.

(5) As the attachment only brings the party into court to answer to interrogatories to be exhibited, there is nothing to acknowledge till they are filed, nor is the party properly in contempt till reported so by the officer of the court; there is nothing, therefore, upon which to ground the judgment. On this principle interrogatories must in all cases be administered even to a confessing defendant, unless the prosecutor waives them. The case of a rescous was supposed to stand on a different ground; there the sheriff had returned the party as guilty of a rescous, and that return was in the nature of a conviction in itself; but the administering interrogatories supposed the possibility of a denial, which was incongruous. However, this reasoning was not very satisfactory, and the exception has been now done away with. *Rex* v. *Edwards* and another, 4 Burr. 2105. *R.* v. *Horsley*, 5 T. R. 362.

to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely antient[r], and has in more modern times been recognized, approved, and confirmed by several express acts of parliament[s], so the method of examining the delinquent himself upon oath with regard to the contempt alleged, is at least of as high antiquity[t], and by long and immemorial usage is now become the law of the land.

[r] Yearb. 20 Hen. VI. f. 37. 22 Edw. IV. f. 29.

[s] Stat. 43 Eliz. c. 6. § 3. 13 Car. II. st. 2. c. 2. § 4. 9 & 10 W. III. c. 15. 12 Ann. st. 2. c. 14. § 5.

[t] M. 5 Edw. IV. rot. 75. cited in Rast. Ent. 268, pl. 5.

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CHAPTER THE TWENTY-FIRST.

OF ARRESTS.

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order; *viz.* 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and it's incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it's consequences; 10. Reversal of Judgment; 11. Reprieve, or pardon; 12. Execution; — all which will be discussed in the subsequent part of this book.

FIRST, then, of an *arrest*: which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases: but no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail when taken. And, in general, an arrest may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private person also without warrant: 4. By an hue and cry.

[290] 1. A WARRANT may be granted in extraordinary cases by the privy council, or secretaries of state[a]; but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence; in order to compel the person accused to appear before them[b]: for it would be

[a] 1 Lord Raym. 65. [b] 2 Hawk. P.C. c. 13. § 15.

absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke indeed[c] hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others[d] held to be grounded rather upon connivance than the express rule of law; though now by long custom established. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore sir Matthew Hale hath combated it with invincible authority, and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*[e]; and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed[f]. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the constable, or other peace-officer, [291] (or, it may be, to any private person by name[g],) requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant[h]. A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it's uncertainty[i]; for it is the duty of the magistrate, and ought not to be left to the

[c] 4 Inst. 176.
[d] 2 Hawk. P.C. c. 13. § 16.
[e] 2 Hal. P.C. 108.
[f] *Ibid.* 110.
[g] Salk. 176.
[h] 2 Hawk. P.C. c. 13. § 26.
[i] 1 Hal. P. C. 580. 2 Hawk. P. C. c. 13. § 10. 17.

officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. (1) It is therefore in fact *no* warrant at all; for it will not justify the officer who acts under it[k]: whereas a warrant, properly penned, (even though the magistrate who issues it should exceed his jurisdiction,) will by statute 24 Geo. II. c. 44. at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. (2) A warrant

[k] A practice had obtained in the secretaries' office ever since the restoration, grounded on some clauses in the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers, or publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired, in 1694, the same practice was inadvertently continued in every reign, and under every administration, except the four last years of queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers, and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of Money v. Leach. *Trin. 5 Geo. III. B. R.* [3 Burr. 1742.] After which the issuing of such general warrants was declared illegal by a vote of the House of Commons. (Com. Journ. 22 Apr. 1766.)

(1) This is rather shortly expressed: in every warrant the guilt or innocence of the person directed to be taken up remains to be determined on his subsequent trial; but if the warrant is to take up A B charged with a murder, the officer obeys the warrant, and will be protected by it, if he takes up A B, though A B is innocent of the murder; whereas if the warrant be to take up the murderer of C D, or the author of such a book, and the officer should take up A B, who turns out not to be the murderer of C D, or the author of the book, he has not obeyed the warrant, and, of course, will not be protected by it. The public mischief is, that the discretion whom to arrest is, in such a case, necessarily exercised by the inferior officer, and not by the magistrate, in whom the constitution reposes it.

(2) Where the warrant is directed to an individual not an officer, or to an officer by name and as an individual, it authorises them to execute it so far as the magistrate's jurisdiction extends, but does not compel the officer to go beyond his own district; where it is directed either to all constables, or to the constables of a particular district, without naming them, it does not authorise, and of course does not compel, them to go beyond their own respective districts. As, however, the magistrate might authorise the officer to act beyond his district, by directing the warrant to him by name, it seems that

from the chief, or other, justice of the court of king's bench extends all over the kingdom: and is *teste'd*, or *dated*, *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county: but the practice of backing warrants had long prevailed without law, and was at last authorised by statutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55. And now, by statute 13 Geo. III. c. 31. any warrant for apprehending an English offender, who may have escaped into Scotland, and *vice versâ*, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdom, in which such offence was committed. (3) [292]

2. ARRESTS by *officers*, *without warrant*, may be executed, 1. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence[l]. 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke[m], hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace.

[l] 2 Hal. P. C. 86. [m] See Vol. I. pag. 355.

that if he in terms directs the officer of parish A. as such (without using his name) to do something in parish B., this may be considered equivalent to a special delegation of authority to him to act out of his parish, because otherwise the warrant would be nugatory on the face of it. See *R.* v. *Weir*, 1 B. & C. 288. Now, indeed, these distinctions are done away by the 5 G. IV. c. 18. which authorizes the constable or other peace-officer of any parish, or place to whom a warrant shall be addressed, not by name, but merely as such, to execute it any where within that jurisdiction, for which the magistrate acted, in granting or backing the warrant.

(3) This act has been amended and enlarged by several subsequent acts, and the 54 G. 3. c. 186. contains a general clause that all warrants issued in England, Scotland, or Ireland respectively, shall be indorsed, executed, enforced, and acted upon by all justices and officers of the peace in any part of the united kingdom, in the manner directed by 13 G. 3. c. 31., in relation to warrants issued in England or Scotland respectively.

And, in case of felony *actually* committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorised (as upon a justice's warrant) to break open doors [after demand of admission and notice that he is constable] and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrests, it is murder in all concerned[n]. 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4., to keep watch and ward in all towns from sun-setting to sun-rising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly night-walkers, and commit them to custody till the morning[o].

[293] 3. Any private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment, if he escapes through the negligence of the standers-by[p]. And they may justify breaking open the doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such arrest, it is murder[q]. Upon probable suspicion also a private person may arrest the felon, or other person so suspected[r]. (4) But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more[s]. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also, because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is, upon an *hue and cry* raised upon a felony committed. An hue (from *huer*, to shout, and cry), *hutesium, et clamor*, is the old com-

[n] 2 Hal. P. C. 90, 91.
[o] *Ibid*, 98.
[p] 2 Hawk. P. C. c. 12. § 1.
[q] 2 Hal. P. C. 77.
[r] Stat. 30 Geo. II. c. 24.
[s] 2 Hal. P. C. 82, 88.

(4) See ante, p. 141. (n. 20.)

mon law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another [t]. It is also mentioned by statute Westm. 1. 3 Ed. I. c. 9. and 4 Edw. I. st. 2. *de officio coronatoris*. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1. and 4., which directs, that from thenceforth every country shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry with all the town and the towns near; and so hue and cry shall be made from town to [294] town, until they be taken and delivered to the sheriff. And that such hue and cry may more effectually be made, the hundred is bound by the same statute, c. 3., to answer for all robberies therein committed, unless they take the felon; which is the foundation of an action against the hundred [u], in case of any loss by robbery. (5) By statute 27 Eliz. c. 13.

[t] Bracton, *l.* 3. *tr.* 2. *c.* 1. § 1. Mirr. *c.* 2. § 6.

[u] See Vol. III. pag. 161.

(5) This provision of the statute has received various modifications by several subsequent statutes, particularly the 27 Eliz. c. 13., 29 C. 2. c. 7., 8 G. 2. c. 16., and the 22 G. 2. c. 24. The general effect of these statutes is to impose certain preliminary conditions on the party seeking to recover against the hundred, to limit the amount which he may recover, and to regulate the mode in which it is to be levied. Upon this subject the important matters to be considered are, 1st, Under what circumstances and at what time the hundred is liable. 2d, What the party must do as the conditions of his recovery. 3d, To what extent he may recover; and, lastly, how he is to have execution of his judgment.

1st, The hundred cannot be made answerable for robberies committed in a house, or in the night-time, or on persons travelling on a Sunday, nor where the felons, or any one of them, is taken before the action commenced. No action can be commenced after a year from the date of the robbery, nor before forty days from it; indeed it is not prudent to commence it till after forty days from public notice of the robbery given in the London Gazette, as the hundred are allowed till that time for the taking the felons.

2d, The party robbed must, with all convenient speed, give notice of the robbery to some of the inhabitants of some town, village, or hamlet near the place of the robbery, and also to one of the hundred constables, or some peace officer of some town, village, or hamlet near to the place of the robbery, or leave notice in writing at his dwelling-house, describing as well as he can the felon or felons, and place of the robbery. He must also, within twenty days after the robbery, cause notice thereof to be given in the

no hue and cry is sufficient, unless made with both horsemen and footmen. And by statute 8 Geo. II. c. 16. the constable or like officer, refusing or neglecting to make hue and cry, forfeits 5*l.*; and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein, and the felon escapes. An institution which hath long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century; which is said to have effectually delivered that vast territory from the plague of robbers, by making, in some places, the villages, in others, the officers of justice responsible for all the robberies committed within their respective districts[w]. Hue and cry[x] may be raised either by precept of a justice of the

[w] Mod. Un. Hist. vi. 383. vii. 156. [x] 2 Hal. P. C. 100—104.

Gazette, describing as well as he can the felons, the time and place of the robbery, and the goods robbed. He must also, within the same time, be examined on oath before some justice of the peace of the county, and inhabiting within or near to the hundred, as to his knowledge of the robbers, and if he admits that he knows them, or any of them, he must enter into a recognisance before the justice of the peace to prosecute them for the robbery. He must also, before he commences the action, go before certain specified officers of the court in which he means to sue, or before the sheriff of the county, and enter into a bond to the hundred constable in the penal sum of 100*l.*, with two sufficient sureties conditioned for the payment of costs, in case of judgment passing against him.

3d, No person can recover more than 200*l.* unless there were two persons at least in company together at the time of the robbery, to attest the truth of the fact. The party himself, however, is, from the necessity of the case, a competent witness to prove his own loss.

Lastly, although the action is in form against the inhabitants generally of the hundred, and formerly both the process might have been served, and execution levied on any inhabitant thereof, who was to be indemnified by a taxation of the hundred; the party is now bound to serve his process in the commencement on the hundred constable, who must appear and defend for the hundred. And when the sheriff receives the writ of execution, he is not to levy either on any particular inhabitant, or on the hundred constable, but to produce the same to two justices of the peace residing within or near the hundred, who are to make an assessment on all places within the hundred for the damages and costs of the party recovering, and also the necessary expences of the defence; and to allow time for this operation, the sheriff has sixty days given him before he can be called upon to return the writ.

Upon this subject, and others connected with it, I refer the student to the notes on *Pinkney* v. *the Inhabitants of East Hundred*, and *Leigh* v. *Chapman*, 2 Saund. p. 374. & 423. ed. 1824.

peace, or by a peace-officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection, and indemnification, as if acting under a warrant of a justice of the peace. But if a man wantonly or maliciously raises an hue and cry, without cause, he shall be severely punished as a disturber of the public peace[y].

In order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers acts of parliament. The statute 4 & 5 W. & M. c. 8. enacts, that such as apprehend a highwayman, and prosecute him to conviction, shall receive a reward of 40*l.* from the public; to be paid to them (or, if killed in the endeavour to take him, their executors,) by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of such robber; with a reservation of the right of any person from whom the same may have been stolen: to which the statute 8 Geo. II. c. 16. superadds 10*l.* to be paid by the hundred indemnified by such taking. By statutes 6 & 7 W. III. c. 17. and 15 Geo. II. c. 28. persons apprehending and convicting any offender against those statutes, respecting the coinage, shall (in case the offence be treason or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By statute 10 & 11 W. III. c. 23. any person apprehending and prosecuting to conviction a felon guilty of burglary, house-breaking, horse-stealing, or private larciny to the value of 5*s.* from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices. And by statute 5 Ann. c. 31. any person so apprehending and prosecuting a burglar, or felonious housebreaker, (or, if killed in the attempt, his executors,) shall be entitled to a reward of 40*l.*[z] By statute 6 Geo. I. c. 23. [295]

[y] 2 Hawk. P.C. c. 12. § 5.

[z] The statutes 4 & 5 W. & M. c. 8. (together with 3 Geo. I. c. 15. § 4., 6 & 7 W. III. c. 17. and 5 Ann. c. 31.

persons discovering, apprehending, and prosecuting to conviction, any person taking reward for helping others to their stolen goods, shall be entitled to forty pounds. By statute 14 Geo. II. c. 6. explained by 15 Geo. II. c. 34. any person apprehending and prosecuting to conviction such as steal, or kill with an intent to steal, any sheep or other cattle specified in the latter of the said acts, shall for every such conviction receive a reward of ten pounds. Lastly, by statute 16 Geo. II. c. 15. and 8 Geo. III. c. 15. persons discovering, apprehending, and convicting felons and others being found at large during the term for which they are ordered to be transported, shall receive a reward of twenty pounds. (6)

which directs the method of reimbursing the sheriffs) are extended to the county-palatine of Durham, by stat. 14 Geo. III. c. 46.

(6) This system of rewards, under which it is to be feared that some melancholy abuses had been practised, has been almost entirely done away with by a recent statute, the 58 G. 3. c. 70. This statute recites the clauses in 4 W. & M. c. 8., 6 & 7 W. 3. c. 17., 10 & 11 W. 3. c. 23., 5 Anne, c. 31., 14 G. 2. c. 6., and 15 G. 2. c. 28. and then in general repeals them, so far as relates to the granting pecuniary rewards to the party apprehending or convicting, but saves to him the right to the horse, furniture, arms, &c. given by the first of the above-named statutes, and saves also the pecuniary rewards to the executors of persons killed in the endeavour to apprehend. It renders also the certificate of exemption from parish offices, granted by the 10 & 11 W. 3. c. 23. (commonly called a Tyburn Ticket) no longer transferable. In the room of this system, it substitutes a power in the court in all cases of felony to order the sheriff or treasurer of the county in which the offence shall have been committed, to pay to the prosecutor and witnesses, bound by recognisance, or attending under subpœna or notice, and also to all persons appearing to have been active in the apprehension, both their costs and expences, and a reasonable compensation for their trouble and loss of time.

It is only to be lamented that this act does not extend to cases of misdemesnor, in which very often considerable hardships occur to poor prosecutors, and witnesses bound over to attend at a distance from their homes, and at a great expence and loss of time.

CHAPTER THE TWENTY-SECOND.

OF COMMITMENT AND BAIL.

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace: and how he is there to be treated, I shall next shew. under the second head, of *commitment* and *bail.*

THE justice before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end, by statute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes [a], was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum:* and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. (1) If upon this inquiry it

[a] *Eirenarch.* b. 2. c. 7. See pag. 357.

(1) The st. 2 & 3 Ph. & M. c. 10. is an extension of the 1 & 2 Ph. & M. c. 13. The first of these relates to the examination of the prisoner and the witnesses against him, in cases where the justices proceed to bail him; the latter, to cases in which they commit him. The provisions are nearly the same; but it is not to be understood, as might be inferred from the text, that these statutes warrant the wringing out the prisoner's offence from himself; on the contrary, he is perfectly at liberty to say nothing, and answer no questions: if he is disposed to speak, a humane and prudent magistrate will feel it to be his duty to caution him against saying any thing which may prejudice himself. After this warning, and a distinct intimation, where inducements have been previously held out to him to confess, that such confession will avail him nothing in remission of punishment, whatever the prisoner says

manifestly appears, that either no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. (2) Otherwise he must either be committed to prison, or give bail: that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capital
[297] nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? Upon a principle similar to which the Athenian magistrates, when they took a solemn oath, never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money, or been guilty of treasonable practices [b]. What the nature of bail is, hath been shewn in the preceding book [c], *viz.* a delivery or bailment, of a person to his sureties, upon their giving, (together with himself,) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every

[b] Pott. Antiq. b.1. c.18. [c] See Vol. III. page 290.

is evidence against himself upon his trial. His examination must not be upon oath, a rule arising from the extreme anxiety of the courts to ascertain that it is purely voluntary. The information of the witnesses must be upon oath, the prisoner is entitled to cross-examine them; but neither party has a right to legal assistance before the magistrate, though there are few cases in which it would be refused to either. The information of the witnesses may be read upon the trial as evidence, if it be shewn that they are dead, unable to travel, or kept out of the way by the prisoner. 2 Hawk. P.C. c. 46. s. 3—10. 1 B. & C. 37.

(2) This sentence is warranted by the authorities of Crompton, Lambard, Dalton, Hale, and Hawkins, who leave little or no discretion in the justice where the charge against the prisoner is positive; but these authorities were questioned in a recent case (1 B. & C. 43.), and the opinion seems now to be, that the justice is to exercise a somewhat more liberal discretion, and not to commit or detain a party on bail, however positively accused, if the balance of testimony be strongly in favour of his innocence.

defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire in what cases the party accused, ought or ought not to be admitted to bail.

And, first, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate by the common law[d], as well as by the statute Westm. 1. 3 Edw. 1. c. 15., and the *habeas corpus* act, 31 Car. II. c. 2. And lest the intention of the law shall be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. st. 2. c. 2. that excessive bail ought not to be required; though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal doth not appear[e]. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate: but most usually by the justices of the peace. Regularly, in all offences, either against the common law or act of parliament, that are below felony, the offender [298] ought to be admitted to bail, unless it be prohibited by some special act of parliament[f]. In order, therefore, more precisely to ascertain what offences *are* bailable,

Let us next see, who may *not* be admitted to bail, or what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences: for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given, *viz.* the body of the accused; in order to insure that justice shall be done upon him, if guilty. Such persons, therefore, as the author of the mirror observes[g], have no

[d] 2 Hawk. P.C. c. 15. § 13.
[e] *Ibid.* c. 15. § 6.
[f] 2 Hal. P.C. 127.
[g] c. 2. § 24.

other sureties but the four walls of the prison. By the antient common law, before [h] and since [i] the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1. 3 Edw. I. c. 15. takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI. c. 9. and 1 & 2 Ph. & Mar. c. 13. give farther regulations in this matter; and upon the whole we may collect [k], that no justice of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another. 5. Persons outlawed: 6. Such as have abjured the
[299] realm; 7. Approvers, of whom we shall speak in a subsequent chapter, and persons by them accused: 8. Persons taken with the mainour, or in the fact of felony: 9. Persons charged with arson: 10. Excommunicated persons, taken by writ *de excommunicato capiendo*: all which are clearly not admissible to bail by the justice. Others are of a dubious nature; as, 11. Thieves openly defamed and known; 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and 13. Accessories to felony, that labour under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as *must* be bailed upon offering sufficient surety; as, 14. Persons of good fame, charged with a bare suspicion of manslaughter, or other inferior homicide; 15. Such persons, being charged with petit larceny, or any felony not before specified: or, 16. With being accessory to any felony. Lastly, it is agreed that the court [l] of king's bench (or any judge [m] thereof in time of vacation) may bail

[h] 2 Inst. 189.

[i] *In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio, ubi ad terrorem aliter statutum est.* (Glanv. l. 14. c. 1.)

[k] 2 Hist. 186. 2 Hal. P. C. 129.

[l] 2 Inst. 189. Latch. 12. Vaugh. 157. Comb. 111. 298. 1 Comyns Dig. 495.

[m] Skin. 683. Salk. 105. Stra. 911. 1 Comyns Dig. 497.

for any crime whatsoever, be it treason [n], murder [o], or any other offence, according to the circumstances of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: exeept only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament, so long as the session lasts: or such as are committed for contempts by any of [300] the king's superior courts of justice [p].

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment: there to abide till delivered by due course of law [q]. But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore in this dubious interval, between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though what are so requisite, must too often be left to the discretion of the gaolers; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law (as formerly held) would not justify them in fettering a prisoner, unless where he was unruly, or had attempted to escape [r]: this being the humane language of our antient lawgivers [s], "*custodes poenam sibi com-*" *missorum non augeant, nec eos torqueant; sed omni saevitia* " *remota, pietateque adhibita, judicia debite exequantur.*"

[n] In the reign of queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treason by any of the queen's privy council. (1 Anders. 298.)

[o] *In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio.* (Glan. *l.* 14. *c.* 1.) *Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regiae potestatis beneficio.* (*Ibid.* *l.* 3.)

[p] Staundf. P. C. 73. *b.*

[q] 2 Hal. P. C. 122.

[r] 2 Inst. 381. 3 Inst. 34.

[s] Flet. *l.* 1. *c.* 26.

CHAPTER THE TWENTY-THIRD.

OF THE SEVERAL MODES OF PROSECUTION.

THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by *presentment* or *indictment*.

I. A PRESENTMENT, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation [a], without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment [b], before the party presented can be put to answer it. An inquisition of office is the act of a jury summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest, or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offences in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. (1) Other in-

[a] Lamb. *Eirenarch.* l. 4. c. 5. [b] 2 Inst. 739.

(1) There is some inaccuracy in this statement. An inquisition finding that a man was *felo de se* cannot, of course, be traversed by the individual but

quisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when [302]
it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it: which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely. (2)

II. An *indictment* [c] is a written accusation of one or more persons of a crime or misdemesnor, preferred to, and pre-

[c] See Appendix, § 1.

but it may be removed into the king's bench by *certiorari*, and there traversed by the executors or administrators of the deceased. *Toomes* v. *Ethrington*, 1 Saund. Rep. 363. n. (1). ed. 1824. As to the flight of persons accused of felony, I am not aware that this was ever made a substantive matter of inquiry, distinct from the trial of the felony itself (see post, 387.); and as that trial could only be in the presence of the party accused, it was then the regular verdict of a jury, after an open trial, and not a case in point. The coroner, indeed, holding an inquisition on the death of a person, may find that he was murdered by A B, and that A B has fled for it; and the authorities all agree that this latter part of the finding is not traversable; though it is observed that no adequate reason for this distinction is to be found in the books. This probably was the flight which the author intended to mention. With respect to deodands, there is no mode, indeed, by which the lord of the franchise can quarrel with the finding of the jury, so as to increase the value they have affixed, but the court will interfere to diminish that value, Foster, 266, and therefore it must be inferred that the finding is not absolutely conclusive.

And, lastly, as to presentments of petty offences in the tourn or leet, Lord Mansfield has said that it cannot be true that they are not traversable any where, *R.* v. *Roupell*, Cowp. 459.; and the law seems to be, that before the fine is estreated and paid, though not afterwards, the presentment may be removed by *certiorari* into the court of king's bench and traversed there, *R.* v. *Heaton*, 2 T. R. 184.

Upon the whole, it may be laid down generally, that with the exception of flight on the death of a man, no finding of an inquisition can be conclusive on a party, who has had no opportunity of vindicating his rights before the jury; while there are cases in which a party who has voluntarily foregone that right in one stage, may yet traverse the finding in some future stage. As where, upon an inquiry by the sheriff under a writ of extent, the jury find certain goods to be the goods of A B, and that finding is returned to the court of exchequer; C D, who claims the goods, and might have done so, but neglected to do so, before the sheriff, may yet traverse the finding in the court above.

(2) For the presentment of nuisances in highways, &c. by justices and others, see ante, p. 167.

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sented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them [d]. They ought to be freeholders, but to what amount is uncertain [e]: which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of king Ethelred [f]. "*Exeant seniores duo-*
"*decim thani, et praefectus cum eis, et jurent super sanctuarium*
"*quod eis in manus datur, quod nolint ullum innocentem accu-*
"*sare, nec aliquem noxium celare.*" In the time of king Richard the first (according to Hoveden) the process of electing the grand jury ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen; and those twelve were to answer concerning all particulars relating to their
[303] own district. This number was probably found too large and inconvenient; but the traces of this institution still remain in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whe-

[d] 2 Hal. P. C. 154.
[e] *Ibid.* 155.
[f] Wilk. *LL. Angl. Sax.* 117.

ther there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes [s]. (3)

THE grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus;* and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament. And to so high a nicety was this matter antiently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them: but by statute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And, by statute 2 Geo. II. c. 21., if the stroke or poisoning be in England, and the death upon the sea or out of England; or, *vice versâ;* the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. And so in some other cases: as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13., 33 Hen. VIII. c. 23., 35 Hen. VIII. c. 2., and 5 & 6 Edw. VI. c. 11. And counterfeiters, washers, or minishers of the current [304] coin, together with all manner of felons and their accessories, may by statute 26 Hen. VIII. c. 6. (confirmed and explained

[s] State Trials, IV. 183.

(3) This is the more manifest, because the form of the indictment is that they, *upon their oath*, present the party to have committed the crime. This form is, perhaps, stronger than might be wished; the law and common sense require, in ordinary cases, that when a man affirms on oath, he should be taken to express his full conviction of the truth of that which he affirms; now the finding of a grand jury is always made with the reserves attendant upon having heard the witnesses on one side only, and, in many cases, with the doubt whether the facts deposed to do not amount to a different offence in law from that which is charged in the bill. It has occurred to me to know that scrupulous minds have been under difficulty as to the line of their duty from these circumstances.

by 34 & 35 Hen. VIII. c. 26. § 85, 86.) be indicted and tried for those offences, if committed in any part [h] of Wales, before the justices of gaol-delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at present in the county of Hereford or Salop: and not, as it should seem, in the county of Chester or Monmouth; the one being a county-palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII. [i] Murders also, whether committed in England or in foreign parts [k], may by virtue of the statute 33 Hen. VIII. c. 23. be inquired of and tried by the king's special commission in any shire or place in the kingdom. By statute 10 & 11 W. III. c. 25. all robberies and other capital crimes, committed in Newfoundland, may be inquired of and tried in any county in England. (4) Offences against the black act, 9 Geo. I. c. 22., may be inquired of and tried in any county in England, at the option of the prosecutor [l]. So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by statutes 8 Geo. II. c. 20. and 13 Geo. III. c. 84., be inquired of and tried in any adjacent county. (5) By statute 26 Geo. II. c. 19. plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 Ann. st. 2. c. 18 [m], may be prosecuted

[h] Stra. 553. 8 Mod. 134.

[i] See Hardr. 66.

[k] Ely's case, at the Old Bailey, Dec. 1720. Roache's case, Dec. 1775.

[l] So held by all the judges, H. 11 Geo. III. in the case of Richard Mortis on a case referred from the Old Bailey. 2 Bl. R. 733.

[m] See pag. 244.

(4) Several statutes have been passed of a temporary nature on the subject of judicature in Newfoundland; the 5 G. IV. c. 67. empowers his Majesty to constitute a supreme court of three judges, with the same powers civil and criminal, as the superior courts of law and equity in England, in which all issues of fact shall be tried by jury. By the same statute his majesty is also empowered to constitute three circuit courts, in which the trial is to be by jury if possible, and if not, by the circuit judge, who is to be one of the judges of the supreme court, and three assessors, justices of the peace, nominated by the governor, but liable to challenge; who are to give their verdict in open court.

(5) The 8 G. 2. c. 20. is repealed as to the capital punishment by the 1 G. 4. c. 115.; but there is nothing in the latter act to alter the regulations as to the trial of the offences specified, which still remain felonies. The 13 G. 3. c. 84. is entirely repealed by the 3 G. 4. c. 126. which act contains no similar provision to that mentioned in the text.

either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining English county: by which is understood to be meant such English county as by the statute 26 Hen. VIII. above-mentioned, had before a concurrent jurisdiction with the great sessions of felonies committed in Wales [n]. Felonies committed out of the realm, in burning or destroying the [305] king's ships, magazines, or stores, may by statute 12 Geo. III. c. 24. be inquired of and tried in any county of England, or in the place where the offence is committed. By statute 13 Geo. III. c. 63. misdemesnors committed in India may be tried upon information or indictment in the court of king's bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet if larciny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both [o]. Or he may be indicted in England, for larciny in Scotland, and carrying the goods with him into England, or *vice versâ*; or for receiving in one part of the united kingdom goods that have been stolen in another [p]. (7) But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larciny in the second county, yet it is not a robbery or burglary in that

[n] At Shrewsbury summer assizes, 1774, Parry and Roberts were convicted of plundering a vessel which was wrecked on the coast of Anglesey. It was moved in arrest of judgment, that Chester and not Salop was the next adjoining English county. But all the judges (in Mich. 15 Geo. III.) held the prosecution to be regular. (6)

[o] 1 Hal. P. C. 507.

[p] Stat. 13 Geo. III. c. 31.

(6) 1 Leach Cr. Ca. 108. 2 East, Pl. C. c. xvi. s. 156.

(7) Similar provisions are now made with respect to Ireland, by the 44 G. III. c. 92. ss. 7, 8.; and by the 59 G. III. c. 96., the difficulties are removed which attended the fixing the place of trial for felonies committed on stage coaches, or other public carriages, in the course of their journey through several counties, as well as felonies committed on highways which form the boundaries of two counties, and of felonies committed any where near the boundary of two counties. In the first case, the trial may be in any county through which the carriage has passed in the course of the journey; in the two last, in either of the two counties.

jurisdiction. And if a person be indicted in one county for larciny of goods originally taken in another, and be thereof convicted or stands mute, (8) he shall not be admitted to his clergy; provided the original taking be attended with such circumstances, as would have ousted him of his clergy by virtue of any statute made previous to the year 1691 [q].

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, "not a true bill;" or, (which is the better way) "not found;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse
[306] upon it, "a true bill;" antiently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation: and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree [r]. And the indictment, when so found, is publicly delivered into court.

Indictments must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5. all indictments must set forth the christian name, surname, and addition of the state, and degree, mystery, town, or place, and the county of the offender: and all this to identify his *person*. The *time*, and *place*, are also to be ascertained by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the *time* be laid

[q] Stat. 25 Hen. VIII. c. 3. 3 W. & M. c. 9. [r] 2 Hal. P. C. 161.

(8) As to standing mute, see post, 324.

previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact[s]. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders: as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination designed or attempted on the person of the king,) unless the bill of indictment be found within three years after the offence committed[t]: and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they [307]. may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably and against his "allegiance;" antiently, "*proditorie et contra ligeantiae suae* "*debitum*:" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "mur- "dered," not "killed," or "slew," the other; which till the late statute was expressed in Latin by the word "*murdravit*[u]." In all indictments for felonies, the adverb "feloniously," "*felonice*," must be used; and for burglaries, also "*burg-* "*lariter*," or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcinies also, the words "*felonice cepit et asportavit*, feloni- "ously took and carried away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off,

[s] 2 Hawk. P.C. c. 46. § 181.
[t] Fost. 249.
[u] See Vol. III. pag. 321.

there such description is impossible[w]. Lastly, in indictments, the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larcinies this is necessary, that it may appear whether it be grand or petit larciny; and whether entitled or not to the benefit of clergy; in homicide of all sorts it is necessary; as the weapon with which it is committed is forfeited to the king as a deodand. (9)

THE remaining methods of prosecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment: as by the
[308] Danish law he might be taken and hanged upon the spot, without accusation or trial[x]. But this proceeding was taken away by several statutes in the reign of Edward the third[y]: though in Scotland a similar process remains to this day[z]. So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

III. INFORMATIONS are of two sorts: first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* actions, (the nature of which was explained in a former volume[a],) only carried on by a criminal instead of a civil process: upon which I shall therefore only

[w] 5 Rep. 122.
[x] Stiernh. *de jure Sueon. l.3. c.5.*
[y] 2 Hal. P.C. 149.
[z] Lord Kaims, I. 331.
[a] See Vol. III. pag. 162.

(9) Although these particulars are still held material to the form of the indictment, from a scrupulous adherence to antient precedents, yet the proof need not correspond precisely to the description or value; the wound proved, so long as it is of the same kind, may differ in length, depth, or situation from that which is charged: the value of the weapon, or of the things stolen, is subject to the same observation. East, P. C. v. s. 110.

observe, that by the statute 31 Eliz. c. 5. no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer, after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence.

THE informations that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney-general, are properly such enormous misdemesnors, as peculiarly tend to disturb or endanger [309] his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all it's parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemesnors, riots, batteries, libels, and other immoralities of an atrocious kind[b], not peculiarly tending to disturb the government, (for those are left to the care of the attorney-general,) but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when

[b] 2 Hawk. P. C. c. 26. § 1.

an information is filed, either thus, or by the attorney-general *ex officio*, it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment.

There can be no doubt but that this mode of prosecution by information, (or suggestion,) filed on record by the king's attorney-general, or by his coroner or master of the crown-office in the court of king's bench, is as antient as the common law itself[c]. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit: so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemesnor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that
[310] information to the court of king's bench by a suggestion on record, and to carry on the prosecution in his majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemesnors only: for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And, as to those offences, in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the stat. 3 Hen. VII. c. 1. had extended the jurisdiction of the court of star-chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assises or before the justices of the peace, who were to hear and

[c] 1 Show. 118.

determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of king Henry VII.), by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices[d], continually haassed the subject and shamefully enriched the crown. The latter of these acts was soon indeed repealed by statute 1 Hen. VIII. c. 6., but the court of star-chamber continued in high vigour, and daily increasing its authority, for more than a century longer; till finally abolished by statute 16 Car. I. c. 10.

Upon this dissolution the old common law[e] authority of the court of king's bench, as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice[f]. And it is observable, that in the same act of parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute[g]. It is true, sir Matthew Hale, who presided in this court soon after the time of such revival, is said[h] to have been no friend to this method of prosecution: and, if so, the reason of such his dislike was probably the ill use which the master of the crown-office then made of his authority, by permitting the subject to be harassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor; rather than his doubt of their legality, or propriety upon urgent occasions[i]. For the power of filing informations, without any controul, then resided in the breast of the master: and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of king William[k], to procure a declaration of their illegality by the judgment [311]

[d] 1 And. 157.
[e] 5 Mod. 464.
[f] Styl. Rep. 217. 245. Styl. pract. Reg. *tit.* Information, pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152.
[g] Stat. 16 Car. I. c. 10. § 6.
[h] 5 Mod. 460.
[i] 1 Saund. 301. 1 Sid. 174.
[k] M. 1 W. & M. 5 Mod. 459. Comb. 141. Far. 361. 1 Show. 106.

of the court of king's bench. But sir John Holt, who then presided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by statute 4 and 5 W. & M. c. 18. which enacts, that the clerk of the crown shall not file any information without express direction from the court of king's bench; and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it; and, at all events, to pay costs,
[312] unless the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations than those which are exhibited by the master of the crown-office: and, consequently, informations at the king's own suit, filed by his attorney-general, are no way restrained thereby. (10)

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(10) The granting permission to file an information is a matter entirely within the discretion of the court; but certain general rules, which they have laid down to guide that discretion, may be collected from the books, and from these they never depart, unless the particular circumstances take the case out of the general principle.

The first rule is, that the party applying must come early; for the inconvenience of delay till a grand jury sits, is one main ground on which the proceeding itself is to be justified. And this is a rule not to be construed technically, but liberally, so that when a public officer complained of a libel which had passed through several editions, the last of which was published recently before the complaint; but several grand juries had sate since the publication of the first, the application was refused, as founded in substance on the first, though in form on the last edition; the matter complained of being the same in both. *R.* v. *O'Meara*, MS. Mich. 1823. In the case of applications against magistrates, the rule is become almost unalterable, that leave will not be granted, even conditionally, if the party applies so late in the second term after the alleged offence committed, that the magistrate cannot show cause against the application in the same term; and it will not be enough for the party applying to explain the delay, by swearing that the facts had only recently come to his knowledge; for refusing the application does not preclude inquiry by the ordinary modes, and the admitting such an excuse would lead to easy evasions of a most useful and equitable rule. It is obvious, that if the court were conditionally to grant the application at

THERE is one species of informations, still farther regulated by statute 9 Ann. c. 20. *viz.* those in the nature of a writ of *quo warranto;* which was shewn, in the preceding volume[1], to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the antient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other inform-

[1] See Vol. III. p. 262.

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at such a time, that the cause against it could not be shown till the third term, the general consequence would only be delay of prosecutions; for in the interval between the offence and that third term the assises must have intervened, at which the applicant might present a bill to the grand jury. And if there are other reasons for applying to the court, such as supposed prejudices or prepossessions in the grand jury of the county, still it is unfair to keep the imputation arising from the doubt even, whether a criminal information will not be filed, hanging over the head of a public functionary in unnecessary suspence. *R.* v. *Bishop*, 5 B. & A. 612.

A second rule in the case of application against magistrates is, that the affidavit of the party applying must directly impute corrupt motives for the misconduct complained of; the court will not lend its extraordinary aid to punish either their ignorance or mistake, but leave the party to his ordinary remedy by indictment or action. *R.* v. *Borron*, 3 B. & A. 432.

A third rule is applicable to the case of informations for libels: there, if the libel complained of imputes to an individual a substantive and definite crime, capable of being distinctly denied, the court will expect that he who complains of the charge, as a ground for the extraordinary interposition of the court, should distinctly, upon affidavit, deny the being guilty of it. The justice of this is self-evident: and it will be more so, when it is recollected that upon the trial of the information, the defendant would not have the power of proving the truth of the charge.

A fourth rule is, that where the act complained of gives the individual a right of action also for civil damages, he must waive that right, unless the court, upon hearing the whole matter, should be of opinion that it is a proper subject to be tried in a civil action, and specifically give him leave so to do. *R.* v. *Sparrow*, 2 T. R. 198.

Prosecutions by the crown for misdemesnors, whether by indictment or information, are now laid under certain regulations by the 60 G. III. and 1 G. IV. c. 4, which enacts, that in such cases the court shall, if required, order a copy of the information or indictment to be delivered, after appearance, free of expence to the defendant, or his attorney; and if the attorney or solicitor-general shall not bring the issue to trial within twelve calendar months after the plea of not guilty pleaded, the court may, on the defendant's application, of which twenty days' notice must be given to the attorney or solicitor-general, allow the defendant to bring on the trial.

ations are, by leave of the court, or at the will of the attorney-general: being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding.

These are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal*.

IV. An appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit at the time of it's first commencement[m]. An appeal, therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. (11) As this method of prosecution is still in force, I cannot omit to men-
[313] tion it: but as it is very little in use, on account of the great nicety required in conducting it, I shall treat of it very briefly; referring the student for more particulars to other more voluminous compilations[n].

This private process, for the punishment of public crimes, had probably its original in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous of-

[m] It is derived from the French, "*appeller*," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "appeal" in English.

[n] 2 Hawk. P.C. ch. 23.

(11) It seems more correct, to say with Hawkins, P.C. b.ii. c. 23. s.1. that an appeal was the party's private action, prosecuting *also* for the crown in respect of the offence against the public; because, as will be stated at page 315, the trial of an appeal was deemed to have satisfied public as well as private justice, and an acquittal upon it was a bar to an indictment. But the whole law of appeals is now little more than matter of curiosity, for the public attention having been drawn to the subject by the appeal of Ashford against Thornton, for the murder of his sister, (1 B.& A. 403.) the 59 G. III. c. 46. was passed, which abolishes all appeals of treason, murder, felony, or other offences.

fences. This was a custom, derived to us, in common with other northern nations [o], from our ancestors, the antient Germans; among whom, according to Tacitus [p], "*luitur* "*homicidium certo armentorum ac pecorum numero; recipitque* "*satisfactionem universa domus* [q]." (12) In the same manner by the Irish Brehon law, in case of murder, the Brehon or judge was used to compound between the murderer and the friends of the deceased who prosecuted him, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense which they called an *eriach* [r]. And thus we find in our Saxon laws (particularly those of king Athelstan [s]) the several weregilds for homicide established in progressive order from the death of the ceorl or peasant, up to that of the king himself [t]. And in the laws of king Henry I. [u], we have an account of what other

[o] Stiernh. *de jure Sueon. l.* 3. *c.* 4.

[p] *de M. G. c.* 21.

[q] And in another place, (*c.* 12.) "*De-* "*lictis, pro modo poena: equorum peco-* "*rumque numero convicti mulctantur.* "*Pars mulctae regi vel civitati; pars ipsi* "*qui vindicatur, vel propinquis ejus, ex-* "*solvitur.*"

[r] Spenser's State of Ireland, p. 1513. *edit.* Hughes.

[s] *Judic. Civit. Lund.* Wilk. 71.

[t] The weregild of a ceorl was 266 thrysmas, that of the king 30,000; each thrysma being equal to about a shilling of our present money. The weregild of a subject was paid entirely to the relations of the party slain; but that of the king was divided; one half being paid to the public, the other to the royal family.

[u] c. 12.

(12) According to an author whom I have before cited, the word *weregild*, is compounded of the German words *wehr*, defence, or guarantee, and *geld*, money, and signifies the price paid by him who had injured another, for protection to be afforded him by the public, against that person's revenge. He marks it as the first step made by our northern ancestors to the placing the punishment of individual wrongs in the hands of the public. In the earliest traces which can be found of it, it seems to have been a private arrangement between the parties, by the intervention of their mutual friends; then the laws fixed the sum, which should be deemed a sufficient compensation for each injury; and, finally, on the payment of that sum, took the injuring party under their protection, and forbade the injured family to prosecute their revenge. At this stage it became natural that a part of the weregild should be paid to the public; the remainder went to the injured person or his family; and the whole was made up by the joint contribution of the individual and his family. This was the natural result of its being a system substituted for one, in which a man's family took part in all his quarrels, and were of course exposed to the consequences of all his actions. 1 Meyer, 126, &c.

offences were then redeemable by weregild, and what were not so [w]. As, therefore, during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that, when
[314] these offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence.

But, though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual, yet it also was antiently permitted, that any subject might appeal another subject of high treason, either in the courts of common law [w], or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battel awarded in the court of chivalry, on such an appeal of treason [y]: but that in the first was *virtually* abolished [z] by the statutes 5 Edw. III. c. 9. and 25 Edw. III. st. 5. c. 4., and in the second *expressly* by statute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem. (13)

An appeal of *felony* may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are *larciny*, *rape*, and *arson*. And for these, as well as for mayhem, the persons

[w] In Turkey this principle is still carried so far, that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and them only, to revenge the slaughter of their kinsmen; and if they rather choose (as they generally do) to compound the matter for money, nothing more is said about it. (Lady M. W. Montague, lett. 42.)

[x] Britt. c. 22.

[y] By Donald lord Rea against David Ramsey. (Rushw. vol. ii. part 2. p. 112.)

[z] 1 Hal. P. C. 349.

(13) Hawkins, b. ii. c. 25. s. 29. doubts whether appeals of treason were abolished, as the text supposes, and his doubt receives some countenance by the fact of the legislature recognising them as a subsisting mode of trial, in the 59 G. III. c. 46. mentioned in note (11).

robbed, ravished, maimed, or whose houses are burnt, may institute this private process. The only crime against one's relation, for which an appeal can be brought, is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confined, by an ordinance of king Henry the first, to the four nearest degrees of blood[a]. It is given to the wife on account of the loss of her husband: therefore, if she marries again, before or pending her appeal, it is lost and gone; or, if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was the next heir by the [315] course of the common law, at the time of the killing of the ancestor. But this rule has three exceptions: 1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal: 2. If there be no wife, and the heir be accused of the murder, the person, who next to him would have been heir male, shall bring the appeal: 3. If the wife kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edw. I. c. 9. all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law: for in the Gothic constitutions we find the same "*praescriptio annalis, quae currit adversus actorem, si de homicida ei non constet intra annum a caede facta, nec quenquam interea arguat et accuset*[b]."

THESE appeals may be brought previous to an indictment: and if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favour, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offence[c]: but, on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so, with us, if a man be acquitted on an indict-

[a] Mirr. c. 2. § 7. *Ibid. l.* 1. *c.* 5.
[b] Stiernh. *de jure Goth. l.* 3. *c.* 4.

ment of murder, or found guilty, and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, by virtue of the statute 3 Hen. VII. c. 1., in order to be forthcoming to answer any appeal for the same felony, not having as yet been punished for it, though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law, that "*nemo "bis punitur prō eodem delicto.*" Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals: which produced very great inconvenience, of which more hereafter[d].

[316] If the appellee be acquitted, the appellor (by virtue of the statute of West. 2. 13 Edw. I. c. 12.) shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained: and, if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta[e], proved a great discouragement to appeals; so that thenceforward they ceased to be in common use.

If the appellee be found guilty he shall suffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered in an action of battery[f]. In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority[g]. And the antient usage was, so late as Henry the fourth's time, that all the relations of the slain should drag the appellee to the place of execution[h]: a custom founded upon that savage spirit of fa-

[d] See pag. 335.
[e] l. 1. c. 34. § 48.
[f] 2 Hawk. P.C. c. 37. § 25.
[g] *LL. Edm.* § 3.
[h] *M.* 11 *Hen. IV.* 12. 3 Inst. 131.

mily resentment, which prevailed universally through Europe after the irruption of the northern nations, and is peculiarly attended to in their several codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state[i]. However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may discharge an appeal[k]; "*nam quilibet potest re-* [317]
"*nunciare juri pro se introducto.*"

THESE are the several modes of prosecution instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall, therefore, confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by either information or appeal.

[i] Robertson, Cha. V. i. 45. [k] 1 Hal. P.C. 9.

CHAPTER THE TWENTY-FOURTH.

OF PROCESS UPON AN INDICTMENT.

WE are next, in the fourth place, to inquire into the manner of issuing *process* after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately (or as soon as convenience permits) to be arraigned thereon. But if he hath fled, or secretes himself, in capital cases; or hath not, in smaller misdemesnors, been bound over to appear at the assises or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And, if it be found, then process must issue to bring him into court; for the indictment cannot be tried, unless he personally appears: according to the rules of equity in all cases, and the express provision of statute 28 Edw. III. c. 3. in capital ones, that no man shall be put to death, without being brought to answer by due process of law.

THE proper process on an indictment for any petit misdemesnor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears, that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *capias*
319] shall issue, which commands the sheriff to take his body, and have him at the next assises: and if he cannot be taken upon

the first *capias*, a second and a third shall issue, called an *alias*, and a *pluries capias*. But, on indictments for treason or felony, a *capias* is the first process: and, for treason or homicide, only one shall be allowed to issue [a], or two, in the case of other felonies, by statute 25 Edw. III. st. 5. c. 14., though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable [b]. And so, in the case of misdemesnors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry; that is, he shall be exacted, proclaimed, or required to surrender at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

THE punishment for outlawries upon indictments for misdemesnors, is the same as for outlawries upon civil actions; (of which, and the previous process by writs of *capias*, *exigi facias*, and *proclamation*, we spoke in the preceding book [c];) *viz.* forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country [d]. His life is however still under the protection of the law, as hath formerly been observed [e]: so that though antiently an outlawed felon was said [320] to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him [f]; because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him:

[a] See Append. § 1.
[b] 2 Hal. P.C. 195.
[c] See Vol. III. pag. 283, 284.
[d] 2 Hal. P.C. 205.
[e] See pag. 178.
[f] Mirr. c. 4. Co. Litt. 128.

yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder[g], unless it happens in the endeavour to apprehend him[h]. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial: and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment.

Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius*: or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those
[321] counties or places where the process of the inferior judges will not reach him[i]. Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari*

[g] 1 Hal. P.C. 497. [h] Bracton, *l.* 3. *tr.* 2. *c.* 11. [i] 2 Hal. P. C. 210.

may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol-delivery, or after issue joined or confession of the fact in any of the courts below [k]. (1)

At this stage of prosecution also it is, that indictments found by the grand jury against a peer must in consequence of a writ of *certiorari* be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament to be there respectively tried and determined.

[k] 2 Hawk. P.C. c. 27. § 27. 2 Burr. 749.

(1) With regard to the prosecutor, there is a distinction between cases which are actually prosecuted by the officer of the crown, on behalf of the rights of the crown; and those in which the prosecution is really by a private person, using only the name of the crown, as it must be used in all prosecutions. In the former, the court exercise no discretion, for the king, it is said, has a right to choose his court; in the latter, they will refuse it upon good cause shewn, though in the first instance they will not call upon the prosecutor to shew any. *R.* v. *Clace.* 4 Burr. 2458.

The removal of indictments for misdemesnors from the general or quarter sessions by defendants, is regulated by several statutes, which limit the time during which, and the conditions upon which, a certiorari shall be granted, so as to prevent its being applied formerely for the purposes of delay.

CHAPTER THE TWENTY-FIFTH.

OF ARRAIGNMENT AND IT'S INCIDENTS.

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment[a]. The prisoner is to be called to the bar by his name; and it is laid down in our antient books[b], that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, *A.D.* 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment[c]. (1)

[323] WHEN he is brought to the bar, he is called upon by name to hold up his hand: which, though it may seem a trifling

[a] 2 Hal. P.C. 216.
[b] Bract. *l.* 3. *tr.* 2. *de coron. c.* 18. § 3. Mirr. *c.* 5. *sect.* 1. § 54. Flet. *l.* 1. *c.* 31. § 1. Brit. *c.* 5. Staundf. P.C. 78. 3 Inst. 34. Kel. 10. 2 Hal. P.C. 219. 2 Hawk. P.C. c. 28. § 1.
[c] State Trials, VI. 230.

(1) The distinction taken in Layer's case was adopted in Waite's case. 1 Leach. Cr. C. 36.

circumstance, yet is of this importance, that by the holding up of his hand *constat de persona*, and he owns himself to be of that name by which he is called [d]. However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient [e].

THEN the indictment is to be read to him distinctly in the English tongue, (which was law, even while all other proceedings were in Latin,) that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted, unless he chose it; for he might waive the benefit of the law: and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, (2) had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible, that a trial of the principal might be had, subsequent to that of the accessory; and therefore the law still continues, that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter. But by statute 1 Ann. c. 9. if [324] the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry,) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above

[d] 2 Hal. P.C. 219. [e] Raym. 408.

(2) As to the effect of challenging more than thirty-five jurors peremptorily, see post, 354.

the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice[f], that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

When a criminal is arraigned, he either *stands mute*, or *confesses* the fact; which circumstances we may call *incidents* to the arraignment: or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute, or confession.

I. Regularly a prisoner is said to stand mute, when, being arraigned for treason, or felony, he either, 1. Makes no answer at all: or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3. Upon having pleaded not guilty, refuses to put himself upon the country[g]. If he says nothing, the court ought *ex officio* to impannel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty[h]. But whether judgment of death can be given against such a pri-
[325] soner who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined[i].

If he be found to be obstinately mute, (which a prisoner hath been held to be that hath cut out his own tongue[k],) then, if it be on an indictment of high treason, it hath long been

[f] Foster, 365, &c.
[g] 2 Hal. P.C. 316.
[h] 2 Hawk. P.C. c. 30. § 7.
[i] 2 Hal. P.C. 317.
[k] 2 Inst. 178.

clearly settled, that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution[l]. And as in this the highest crime, so also in the lowest species of felony, *viz.* in petit larciny, and in all misdemesnors, standing mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not, by the antient law, looked upon as convicted, so as to receive judgment for the felony; but should, for his obstinacy, have received the terrible sentence of *penance*, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisone) forte et dure.*

BEFORE this was pronounced, the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger[m]; and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it.[n] Thus tender was the law of inflicting this dreadful punishment; but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him without any distinction of sex or degree. A judgment, which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

THE rack, or question, to extort a confession from criminals, is a practice of a different nature; *this* having been only [326] used to compel a man to put himself upon his trial; *that* being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other ministers of Henry VI. had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the Duke of Exeter's daughter, and still remains in the tower of London[o];

[l] 2 Hawk. P.C. c.30. § 9. 2 Hal. P.C. 317.
[m] 2 Hal. P. C. 320.
[n] 2 Hal. P. C. 321. 2 Hawk. P. C. c. 30. § 24.
[o] 3 Inst. 35.

where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth [p]. (3) But when, upon the assassination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England [q]. It seems astonishing that this usage of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for its introduction in the civil law, and it's subsequent adoption by the French (4) and other foreign nations [r]: *viz.* because the laws cannot endure that any man should die upon the evidence of a false, or even a single witness; and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves! —But there needs only to state accurately [s], in order most effectually to expose this inhuman species of mercy, the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully: though he lived
[327] in a state wherein it was usual to torture slaves in order to furnish evidence: "*tamen*," says he, "*illa tormenta gubernat* "*dolor, moderatur natura cujusque tum animi tum corporis,*

[p] Barr. 92, 496.

[q] Rushw. Coll. i. 638.

[r] *Cod. l.* 9. *t.* 41. *l.* 8. *& t.* 47. *l.* 16. *Fortesc. de LL. Ang. c.* 22.

[s] The marquis Beccaria (ch. 12.), in an exquisite piece of raillery, has proposed this problem, with a gravity and precision that are truly mathematical, "The force of the muscles and the sen- "sibility of the nerves of an innocent "person being given, it is required to "find the degree of pain necessary to "make him confess himself guilty of a "given crime."

(3) I am afraid it was used more often in the reign of Elizabeth, than the text seems to imply, and in the case of persons, who were afterwards tried and convicted upon evidence elicited by this mean. See Lingard, vol. viii. p. 521. who describes the instruments of torture in use, and gives a list of many upon whom they were applied.

(4) This disgraceful practice no longer exists in the French law; and in the case of an unauthorised or illegal imprisonment, it is made a capital crime to inflict torture on the party imprisoned. Code Penal. l. 3. t. 2. s. 344.

" regit quaesitor, flectit libido, corrumpit spes, infirmat metus,
" ut in tot rerum angustiis nihil veritati loci relinquatur [t]."

THE English judgment of penance for standing [u] mute was as follows: that the prisoner be remanded to the prison from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day three morsels of the worst bread; and, on the second day, three draughts of standing water, that should be nearest to the prison-door; and in this situation this should be alternately his daily diet *till he died*, or (as antiently the judgment ran) *till he answered*.[v]

IT hath been doubted whether this punishment subsisted at the common law [w] or was introduced in consequence of the statute Westm. 1. 3 Edw. I. c. 12.[x] which seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, case, or record, (that hath yet been produced,) previous to the reign of Edward I.; but there are instances on record in the reign of Henry III.[y], where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted: and it is asserted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony [z]. This statute of Edward I. directs such persons " as will not put themselves upon inquests of felonies before [328] " the judges at the suit of the king, to be put into hard and " strong prison (*soient mys en la prisone fort et dure*) as those " which refuse to be at the common law of the land." And immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance;

[t] *Pro Sulla.* 28.

[u] 2 Hal. P. C. 319. 2 Hawk. P. C. c. 30. § 16.

[v] Britton, c. 4. & 22. Flet. *l.* 1. *t.* 34. § 33.

[w] 2 Inst. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. c. 30. § 16.

[x] Staundf. P. C. 149. Barr. 82.

[y] Emlyn on 2 Hal. P. C. 322.

[z] *Al common ley, avant le statute de West.* 1. *c.* 12. *si ascun ust estre appeal, et ust estre mute, il serra convict de felony.* (*M.* 8. *Hen. IV.* 2.)

but no weight is directed to be laid upon the body, so as to hasten the death of the miserable sufferer: and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the [a] Mirror as a species of criminal homicide. It also clearly appears, by a record of 31 Edw. III [b], that the prisoner might then possibly subsist for forty days under this lingering punishment. I should therefore imagine that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edw. III. and 8 Hen. IV., at which last period it first appears upon our books [c]; being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment; and hence I presume it also was, that the duration of the penance was then first [d] altered; and instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure.

THE uncertainty of it's original, the doubts that were conceived of it's legality, and the repugnance of it's theory (for it was rarely carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the antient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have still innocently re-
[329] mained, as a monument of the savage rapacity with which the lordly tyrants of feodal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the *lands*, were saved in felony and petit treason, though not the forfeiture of the *goods*: and therefore this lingering punishment was probably introduced, in order to extort a plea: without which it was held that no judgment of

[a] ch. 1. § 9.
[b] 6 Rym. 13.
[c] Yearb. 8 Hen. IV. 1.
[d] *Et fuit dit, que le contraire avant estre fait devant ces heurs.* (*Ibid.* 2.)

death could be given, and so the lord lost his escheat (5). But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it, as in other cases of conviction [e]. And very lately, to the honour of our laws, it hath been enacted by statute 12 Geo. III. c. 20. that every person who, being arraigned for felony or piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same, and the same judgment and execution, (with all their consequences in every respect,) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime. (6) And thus much for the demesnor of a prisoner upon his arraignment by standing mute; which now, in all cases, amounts to a constructive confession.

II. The other incident to arraignments, exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very back-

[e] 2 Hawk. P.C. c. 30. § 9.

(5) Mr. Christian, in a note at p. 325, mentions an affecting story of a father, who, in a fit of jealousy, killed his wife, and all his children who were at home, by throwing them from the battlements of his castle; and proceeding towards a farm-house at some distance, with an intent to destroy his only remaining child, an infant there at nurse, was intercepted by a storm of thunder and lightning. This awakened in his breast the compunctions of conscience. He desisted from his purpose, surrendered himself to justice, and in order to secure his estates to his child, had the resolution to die under the *peine forte et dure*.

(6) Mr. Christian, in a note on this passage, truly observes, that it would have been a greater improvement of the law, if the prisoner's silence had been considered a plea of not guilty, rather than a confession; inasmuch as it would operate more powerfully as an example, and be more satisfactory to the minds of the public, if the prisoner should suffer death after a public manifestation of his guilt by evidence, than that he should be ordered for execution only from the presumption which arises from his obstinate silence. It may be added, too, that such a proceeding would be far more consonant to the principles of justice; considered as a punishment for obstinacy, the law is disproportionately severe; and considered as founded on the strong proof of guilt, afforded by silence, it is unsatisfactory, because silence may also arise from extreme obstinacy, or reckless desperation, or some other of those many perversions to which the human mind is liable.

ward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment.[f]

But there is another species of confession, which we read much of in our antient books, of a far more complicated kind, which is called *approvement*. And that is when a per-
[330] son, indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded (7); and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an *approver* or prover, *probator*, and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it: and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battel, or by the country; and if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiae*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, *viz.* the convicting of some other person, and therefore his conviction remains absolute.

But it is purely in the discretion of the court to permit the approver thus to appeal, or not: and, in fact, this course of admitting approvements hath been long disused: for the truth was, as sir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety

[f] 2 Hal. P. C. 225.

(7) It seems that the approver not only confessed the crime of which he was indicted, but was sworn to reveal all the treasons and felonies of which he could give any information. Rudd's Case. Cowper. 335.

were held therein [g]: though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use. I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement, is fully provided for in the cases of coining, robbery, burglary, house-breaking, horse-stealing, and larciny to the value of five shillings from shops, warehouses, stables, and coach-houses, by statutes 4&5 W. & M. c. 8. 6&7 W. III. c. 17. [331] 10&11 W. III. c. 23. and 5&6 Ann. c. 31., which enact, that if any such offender, being out of prison, shall discover two or more persons, who have committed the like offences, so as they may be convicted thereof; he shall in case of burglary or house-breaking receive a reward of 40*l.* and in general be entitled to a pardon of all capital offences, excepting only murder and treason; and of them also in the case of coining [h]. And if any such person, having feloniously stolen any lead, iron, or other metal, shall discover and convict two offenders of having illegally bought or received the same, he shall by virtue of statute 29 Geo. II. c. 30. be pardoned for all *such* felonies committed before such discovery. It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree [i]. (8)

[g] 2 Hal. P. C. ch. 29. 2 Hawk. P.C. ch. 24.

[h] The pardon for discovering offences against the coinage act of 15 Geo. II. c. 28. extends only to all *such* offences.

[i] The king *v.* Rudd; Mich. 16 Geo. III. on a case reserved from the Old Bailey, Oct. 1775.

(8) See ante, p. 295. (n.6). The case of the *King* v. *Rudd* is reported in Cowper, p. 331; and is exceedingly worth reading, both for its luminous abstract of the Law of Approvement by Lord Mansfield, and also the clear statement of the practice as to King's Evidences.

CHAPTER THE TWENTY-SIXTH.

OF PLEA, AND ISSUE.

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement: 4. A special plea in bar; or, 5. The general issue.

FORMERLY there was another plea, now abrogated, that of *sanctuary*; which is however necessary to be lightly touched upon, as it may give some light to many parts of our antient law; it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First then, it is to be observed, that if a person accused of any crime, (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, *viz.* that he abjured the realm, and would depart from thence forthwith at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in his hand,
[333] and with all convenient speed to the port assigned, and embarking. For if, during this forty days' privilege of sanctuary, or in his road to the sea-side, he was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if

taken out against his will [a]. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels [b]. The immunity of these privileged places was very much abridged by the statutes 27 Hen. 8. c. 19. and 32 Hen. 8. c. 12. And now by the statute 21 Jac. 1. c. 28. all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished.

FORMERLY also the benefit of clergy used to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name also given to that of sanctuary [c]. But, as the prisoner upon a trial has a chance to be acquitted, and totally discharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction, [and is entitled to it but once if a layman;] this course is extremely disadvantageous; and therefore the benefit of clergy is now very rarely pleaded; but, if found requisite, is prayed by the convict before judgment is passed upon him (1).

I PROCEED, therefore, to the five species of pleas before mentioned.

I. A PLEA to the *jurisdiction* is where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape at a sheriff's tourn, or for treason at the quarter sessions: in these, or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged [d].

[a] Mirr. c. 1. § 13. 2 Hawk. P. C. c. 32.

[b] 2 Hawk P.C. c. 9. § 44.

[c] 2 Hal. P.C. 236.

[d] *Ibid.* 256.

(1) Supposing the prisoner upon his arraignment to plead his clergy by way of declinatory plea, he was not immediately delivered to the ordinary without enquiry, but the justices issued a writ to the sheriff, who returned a jury of twenty-four. These constituted an inquest *ex officio* and examined both as to the fact of his being a clergyman, and also as to his guilt; if they found both in the affirmative, he was delivered to the ordinary, but forfeited his goods; if they negatived the first fact, the prisoner pleaded over in bar; and the trial went on in the ordinary course; if they negatived the latter fact, he was discharged at once. In Hale's P.C. and the notes will be found several records of these proceedings, vol. 1. p. 180., where the form is *ut sciatur pro quali eidem ordinario liberari debeat.* Ibid. p. 343. vol. ii. p. 518. 378.

II. A DEMURRER to the indictment. This is incident to criminal cases, as well as civil, when the fact as alleged is
[334] allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it; in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held [e], that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others [f], who hold that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shewn it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty [g]. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used; since the same advantages may be taken upon a plea of not guilty; or afterwards in arrest of judgment, when the verdict has established the fact.

III. A PLEA in *abatement* is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As, if *James* Allen, *gentleman*, is indicted by the name of *John* Allen, *esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the indictment

[e] 2 Hal. P.C. 257.
[f] 2 Hawk. P.C. c.31. §5. 6.
[g] 2 Hal. P.C. 225.

shall be abated, as writs or declarations may be in civil actions; of which we spoke at large in the preceding volume[i]. But, in the end, there is little advantage accruing to the prisoner, by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. Let us therefore next consider a more substantial kind of plea, *viz.*

IV. SPECIAL pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal[j]; but these are applicable to both appeals and indictments.

1. FIRST, the plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence[k], he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law[l]: and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past: by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1. enacts, that indictments shall be proceeded on immediately, at the king's suit, for the death

[i] See Vol. III. pag. 302.
[j] 2 Hawk. P.C. ch. 23.
[k] 3 Mod. 194.
[l] 2 Hawk. P.C. c. 56. § 1.

of a man, without waiting for bringing an appeal; and that the plea of *autrefoits acquit* on an indictment, shall be no bar to the prosecuting of any appeal.

2. Secondly, the plea of *autrefoits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes,) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime [l]. Hereupon it hath been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *autrefoits acquit* and *autrefoits convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime (2). But the case is otherwise, in

3. Thirdly, the plea of *autrefoits attaint*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony [m]. And this because, generally, such proceeding on a second prosecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attaint him a second time. But to this general

[l] 2 Hawk. P.C. c. 36. § 10. [m] *Ibid.* c. 36.

(2) The test of identity is, whether the same evidence will prove both indictments; if it will not, the party has never been in jeopardy before for the same fact. This applies to the numerous cases of acquittals for misdescriptions, and other formal inaccuracies, in which it is very common to prefer a second bill of indictment, which will not be barred by the former trial.

rule, however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex.* As, 1. Where the former attainder is reversed for error, for then it is the same as if it had never been. And the same reason holds, [337] where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony, is afterwards indicted as principal in another, to which there are also accessories, prosecuted at the same time; in this case it is held, that the plea of *autrefoits attaint* is no bar, but he shall be compelled to take his trial, for the sake of public justice: because the accessories to such second felony cannot be convicted till after the conviction of the principal[n]. And from these instances we may collect that a plea of *autrefoits attaint* is never good, but when a second trial would be quite superfluous[o].

4. Lastly, a *pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past; which gives it by much the preference to pleading it *after* sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood; which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament. But as the title of pardons is applicable to other stages of prosecution; and they have their respective force

[n] Poph. 107. [o] Staund. P. C. 107.

and efficacy, as well after as before conviction, outlawry, or
[338] attainder; I shall therefore reserve the more minute consideration of them, till I have gone through every other title except only that of execution.

Before I conclude this head of special pleas in bar, it will be necessary once more to observe, that though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as if, on an action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first: for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence;) though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium*: yet in criminal prosecutions *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty[p]. For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted; *viz.* on the general issue, after an impartial examination and decision of the fact, by the unanimous verdict of a jury. (3) It remains therefore that I consider,

[p] 2 Hal. P.C. 239.

(3) In criminal cases if a plea in abatement is found against the defendant, the general rule is that it is final, and he cannot plead over; the law laid down in the text is an exception to the rule in *favorem vitæ*, and prevails only in treasons and felonies. *R.* v. *Gibson*, 8 East, 107.

With respect to pleas in bar, it should seem on legal principles, that the same rule with the same exception should prevail; and where the plea contains a confession in fact as in the cases of autrefois convict or pardon, there seems to be no hardship in awarding judgment, if the matter of defence be untrue, or the plea be bad in law. But where that is not the case, as in autrefois acquit, the same reasoning does not hold. An instance of this kind is at present under the consideration of the court of K. B., where upon demurrer to a plea of autrefois acquit the judgment was for the crown. The rule therefore may be considered as still uncertain.

V. The general issue, or plea of *not guilty*[q], upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are laid to be done *proditorie et contra ligeantiae suae debitum*, [339] and, in felony, that the killing was done *felonice*; these charges, of a traiterous or felonious intent, are the points and very *gist* of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner[r].

When the prisoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*," the clerk of the assise, or clerk of the arraigns, on behalf of the crown, replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul. prit.*" which signifies first that the prisoner is guilty, (*cul. culpable*, or *culpabilis*,) and then that the king is ready to prove him so; *prît*, *pracsto sum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner: for when the pleader intended to demur, he expressed his demurrer in a single word, "*judgment*;" signifying that he demanded judgment, whether the writ, declaration, plea, &c. either in form or matter, were sufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prît*;" signifying that he was ready to

[q] See Append. § 1. [r] 2 Hal. P.C. 258.

prove his assertions: as may be observed from the year-books and other antient repositories of law[s]. By this replication the king and the prisoner are therefore at issue; for we may remember, in our strictures upon pleadings, in the preceding book[t], it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact: which is evidently the case here, in the plea of *non cul.* by the prisoner; and the replication of *cul.* by the clerk. And we may also remember, that the usual conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in these words, "and this he is *ready* to verify; *et hoc paratus est verificare:*" which same thing is here expressed by the single word "*prît.*"

How our courts came to express a matter of this importance in so odd and obscure a manner, "*rem tantam tam* "*negligenter,*" can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment; "*cul. prît:*" which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken[u].

But however it may have arisen, the joining of issue (which though now usually entered on the record[w], is no otherwise joined[x] in any part of the proceedings) seems to be clearly the meaning of this obscure expression[y]: which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking

[s] North's Life of Lord Guildford, 98.

[t] See Vol. III. pag. 313.

[u] Of this ignorance we may see daily instances in the abuse of two legal terms of antient French; one, the prologue to all proclamations, "*oyez,*" or hear ye, which is generally pronounced most unmeaningly, "O yes;" the other, a more pardonable mistake, *viz.* when a jury are all sworn, the officer bids the crier number them, for which the word in law-french is, "*counter*" "*tez;*" but we now hear it pronounced in very good English, "count these."

[w] See Appendix, § 1.

[x] 2 Hawk. P.C. c. 38.

[y] 2 Hal. P.C. 258.

him, "*culprit*, how wilt thou be tried?" for immediately upon issue joined, it is inquired of the prisoner, by what trial he will make his innocence appear. This form has at present reference to appeals and approvements only wherein the appellee has his choice, either to try the accusation by battel or by jury. But upon indictments, since the abolition of [341] ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and his country[z], if a commoner; and, if a peer, by God and his peers[a]; the indictment, if in treason, is taken *pro confesso*; and the prisoner, in cases of felony, is adjudged to stand mute, and if he perseveres in his obstinacy, shall now[b] be convicted of the felony.

When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

[z] A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is, "*by God or the country*," that is, either by *ordeal* or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by *ordeal* used formerly to be called *judicium Dei*. But it should seem, that when the question gives the prisoner an option, his answer must be positive; and not in the disjunctive, which returns the option back to the prosecutor.

[a] Keylinge, 57. State Trials *passim*.

[b] Stat. 12 Geo. III. c. 20.

CHAPTER THE TWENTY-SEVENTH.

OF TRIAL AND CONVICTION.

THE several methods of trial and conviction of offenders established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon ancestors: who, like other northern nations, were extremely addicted to divination: a character, which Tacitus observes of the antient Germans[a]. They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.

1. THE most antient[b] species of trial was that by *ordeal*: which was peculiarly distinguished by the appellation of *judicium Dei*; and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts[c], either *fire*-ordeal, or *water*-ordeal; the former being confined to persons of higher rank, the latter to the common people[d]. Both these might be
[343] performed by deputy: but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship[e]. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight;

[a] *de mor. Germ.* 10.

[b] *LL. Inae. c.* 77. Wilk. 27.

[c] Mirr. c. 3. § 23.

[d] *Tenetur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum si fuerit homo liber; per aquam, si fuerit rusticus.* (Glanv. *l.* 14. *c.* 1.)

[e] This is still expressed in that common form of speech, "of going through "fire and water to serve another."

or else by walking barefoot, and blind-fold, over nine red-hot ploughshares, laid lengthwise at unequal distances: and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn bishop of Winchester[f].

WATER-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt therefrom; or by casting the person suspected into a river or pond of cold water; and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practised in many countries to discover witches by casting them into a pool of water, and drowning them to prove their innocence. And in the eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining (as has been well remarked[g]) to the most dubious crime in the world, the most dubious proof of innocence. (1)

AND indeed this purgation by ordeal seems to have been very antient and very universal, in the times of superstitious

[f] Tho. Rudborne, *Hist. maj. Winton.* l. 4. c. 1.

[g] Sp. L. b. 12. c. 5.

(1) The word ordeal according to Meyer, is from the same original, as oordeel in Dutch, and urtheil in German, and signified judgment; so that the term was used καῖ' ἐξοχην to denominate the highest and most respected form of trial. He deduces the practice from a still earlier mode of trying doubtful offences by lots, which itself is referable to that partiality for *auspicia* and *sortes* mentioned by Tacitus, as remarkable among the antient Germans, and which, with many other similar feelings and habits, they carried with them, and retained under modified forms after their conversion to Christianity.

Meyer mentions two instances of reputed witches being submitted by popular superstition to the trial by fire or water in Flanders, so lately as 1815 and 1816. Vol. I. 315, 322.

barbarity. It was known to the antient Greeks: for in the Antigone of Sophocles[h], a person suspected by Creon of a misdemesnor, declares himself ready "to handle hot iron, "and to walk over fire," in order to manifest his innocence; which, the scholiast tells us, was then a very usual purgation. And Grotius[i] gives us many instances of water-ordeal in Bithynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal, said to prevail among the Indians on the coast of Malabar; where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As, in Siam, besides the usual methods of fire and water-ordeal, both parties are sometimes exposed to the fury of a tyger let loose for that purpose; and, if the beast spares either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion[k].

ONE cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as king John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquae, et ignis*[l]. And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground; for which Stiernhook[m] gives the reason; "*non defuit illis operae et laboris* "*pretium; semper enim ab ejusmodi judicio aliquid lucri sacer-* "*dotibus obveniebat.*" But, to give it it's due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum sit* "*contra praeceptum Domini, non tentabis Dominum Deum* "*tuum*[n]." Upon this authority, though the canons themselves were of no validity in England, it was thought proper

h, v. 264.

i On Numb. v. 17.

k Mod. Univ. Hist. vii. 260.

l Spelm. *Gloss.* 435.

m *De jure Sueonum, l.* 1. c. 8.

n *Decret. part* 2. *caus.* 2. *qu.* 5. *dist.* 7. *Decretal. lib.* 3. *tit.* 50. *c.* 9. & *Gloss. ibid.*

(as had been done in Denmark above a century before[o]) to disuse and abolish this trial entirely in our courts of justice, by an act of parliament in 3 Hen. III. according to sir Edward Coke[p], or rather by an order of the king in council[q].

II. ANOTHER species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned* or morsel of execration: being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment, if he was innocent[r]: as the water of jealousy among the Jews[s] was, by God's special appointment, to cause the belly to swell, and the thigh to rot, if the woman was guilty of adultery. This corsned was then given to the suspected person, who at the same time also received the holy sacrament[t]: if indeed the corsned was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin earl of Kent, in the reign of king Edward the confessor, abjuring the death of the king's brother, at last appealed to his corsned, "*per buccellam deglutiendam abjuravit*[u]," which stuck in his throat and killed him. This custom has been long since gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people[w].

HOWEVER, we cannot but remark, that though in European [* 346] countries this custom most probably arose from an abuse of revealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprized to find, that in the kingdom of Pegu there still exists a trial by the corsned, very

[o] Mod. Un. Hist. xxxii. 105.
[p] 9 Rep. 32.
[q] 1 Rym. *Fœd.* 228. Spelm. *Gloss.* 326. 2 Pryn. Rec. Append. 20. Seld. *Eadm. fol.* 48.
[r] Spelm. *Gl.* 439.
[s] Numb. ch. v.
[t] *LL. Canut. c.* 5.
[u] Ingulph.
[w] As, "I will take the sacrament "upon it; may this morsel be my "last;" and the like.

similar to that of our ancestors, only substituting raw rice instead of bread[x]. And, in the kingdom of Monomotapa, they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree, endued with an emetic quality; which being sufficiently masticated, is then infused in water, which is given the defendant to drink. If his stomach rejects it, he is condemned: if it stays with him, he is absolved, unless the plaintiff will drink some of the same water; and, if it stays with him also, the suit is left undetermined[y]. (2)

These two antiquated methods of trial, were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes it's introduction among us to the princes of the Norman line. And that is,

III. The trial by *battel*, duel, or single combat; which was another species of presumptuous appeals to Providence, under an expectation that heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book[z]: to which I have only to add, that the trial by battel may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must

[x] Mod. Univ. Hist. vii. 129.
[y] *Ibid.* xv. 464.
[z] See Vol. III. pag. 337.

(2) Meyer cites from Marculph a mode of trial, whimsical enough, but not very uncertain in the result, the trial by the cross. In the instance given the question was between the bishop and clergy of Verona on the one side, and the citizens on the other, as to the liability to repair the walls of the city. Two young ministers of blameless conduct were chosen, and placed in the church of St. John the Baptist before the cross, at the beginning of the mass; one the representative of the clergy, the other of the laity; and the decision of the cause depended on the fact, which of the two should fall to the ground first. As might have been anticipated, the former stood firm through the whole service, the latter fell senseless about the middle of it. 1 Meyer, 317.

fight in their proper persons. And therefore if the appellant, or approver, be a woman, a priest, an infant, or of the age of sixty, or lame, or blind, he or she may counterplead and refuse the wager of battel; and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battel, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So likewise if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battel from the appellee [a]; for it is unreasonable that an innocent man should stake his life against one who is already half-convicted.

THE form and manner of waging battel upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn [b]. The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to this effect: "*Hoc audi, homo, quem per manum teneo,*" *&c.* "Hear this, O man, whom I hold by the hand, who callest "thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously "murder thy father, William by name, nor am any way "guilty of the said felony. So help me God, and the saints; "and this I will defend against thee by my body, as this court "shall award." To which the appellant replies, holding the Bible and his antagonist's hand in the same manner as the other: "Hear this, O man, whom I hold by the hand, who callest "thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that thou feloniously "didst murder my father, William by name. So help me "God, and the saints; and this I will prove against thee by

[a] 2 Hawk. P.C. c.45. § 7. [b] Flet. l. 1. c.34. 2 Hawk. P.C. c.43. § 3.

" my body, as this court shall award [c]." The battel is then to be fought with the same weapons, *viz.* batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat: and if the appellee be so far vanquished, that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately; and then, as well as if he be killed in battel, Providence is deemed to have determined in favour of the truth, and his blood shall be attainted. But if he kills the appellant, or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So also if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall lose his *liberam legem*, and become infamous; and the appellee shall recover his damages, and also be for ever quit, not only of the appeal, but of all indictments likewise for the same offence. (3)

IV. The fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or the court of the lord high steward, when a peer is capitally *indicted*: for in case of an *appeal*, a peer shall be tried by jury [d]. Of this enough has been said in a former chapter [e]; to which I shall only now add, that in the method and regulation of its proceedings, it differs little from the trial *per patriam*, or by jury; except that no special verdict can be given in the trial of a peer [f]; because the lords of parliament, or the lord high steward, (if the trial be had in his court,)
[349] are judges sufficiently competent of the law that may arise from the fact: and except also, that the peers need not all

[c] There is a striking resemblance between this process and that of the court of *Areopagus* at Athens for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner: the prosecutor, that he was related to the deceased, (for none but near relations were permitted to prosecute in that court,) and that the prisoner was the cause of his death; the prisoner, that he was innocent of the charge against him. (Pott. Antiq. b. 1. c. 19.)

[d] 9 Rep. 30. 2 Inst. 49.

[e] See pag. 259.

[f] Hatt. 116.

(3) See the case of *Ashford* v. *Thornton*, 1 B. & A. 405, in which a great deal of learning and talent was displayed on this obscure subject. But the whole has become matter rather of curiosity than practical use by the abolition of appeals under 59 G. 3. c. 46.

agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority [g].

V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter [h]: "*nullus liber homo capiatur, vel imprisonetur, aut "exulet, aut aliquo alio modo destruatur, nisi per legale judi-"cium parium suorum, vel per legem terrae.*"

The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large [i]. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of [350] indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate; not

[g] Kelynge, 56. stat. 7 W. III. c. 3. § 11. Foster, 247.
[h] 9 Hen. III. c. 29.
[i] See Vol. III. pag. 379.

only from all open attacks, (which none will be so hardy as to make,) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*,) yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern. (4)

What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits; indictments, informations, and appeals; which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When therefore a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon the

(4) In the account which Meyer has deduced from the ancient capitularies and laws of the German tribes, of the progress of their judicial institutions, there seem to be analogies to the present form of trial by jury, which cannot be accidental. It was the duty of all freemen to attend the national assemblies, in which, under the presidence of the head of the nation, they determined all suits: as the nations increased in size, so that it was impossible to assemble the freemen often enough for judicial purposes, district assemblies were held for the same objects, but the same form and rules were observed in these as in the former meetings. The Grave, (Gravio,) or Count, presided, the freemen, (Arimanni or Rachimburgii,) were the judges; the decision was always *judicium bonorum virorum quod ei a Rachimburgiis fuerit judicatum.* But then the count was bound to know the law, and expound it to the freemen; when all the pleadings were gone through, and the proofs closed, he did so, and asked them for their judgment: *comites et vicarii eorum leges sciant, ut* ante eos *injustè* neminem *quis judicare possit aut legem mutare.* 1 Meyer, c. 10, 11, 12.

country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto;* that is, freeholders (5), without just exception, and of the *visne* or neighbourhood; which is interpreted to be of the county where the fact is committed[j]. If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impanelled by a writ of *venire facias* to the sheriff, as in civil causes: [351] and the trial in case of a misdemesnor is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence. But, before commissioners of *oyer* and *terminer* and gaol delivery, the sheriff, by virtue of a general precept directed to him before-hand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session; and therefore it is there usual to try all felons immediately, or soon after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons indicted of smaller misdemesnors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court, to appear at the next assises or session, and then and there to try the traverse, giving notice to the prosecutor of the same. (6)

[j] 2 Hal. P. C. 264. 2 Hawk. P. C. c. 40. § 1.

(5) The 4&5 W.& M. c. 24. (see Vol. III. p. 362.) extends to jurors for the trial of criminal as well as civil issues; and therefore copyholders of 10*l. per annum* within the county may be returned on the panel. The same observation will apply to leaseholders under the 3 G. 2. c. 25.; but both these must be understood with the exception of trials for high treason, in which, by the bill of rights, 1 W.& M. st. 2. c. 2. the jurors ought to be freeholders.

(6) This is now regulated by the 60 G. 3. & 1 G. 4. c. 4. which provides for the trial of misdemesnors in the court of K. B., and also at the assizes or sessions. In the former case the defendant, instead of being allowed till the next term after that in which he appears, is compelled to plead or demur within four days from such appearance; in the latter, if he has been in custody or held to bail twenty days before the assizes or sessions at which the indictment is found, he must plead instantly, and take his trial at the same assizes or sessions; if he has not been committed or held to bail twenty days before, but has been committed or held to bail to appear

In cases of high treason, whereby corruption of blood may ensue, (except treason in counterfeiting the king's coin or seals,) or misprision of such treason, it is enacted by statute 7 W. III. c. 3. first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment, (which includes the caption[k],) but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment[l]; for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he shall also have a copy of the panel of jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in his witnesses *for* him as was usual to compel their appearance *against* him. And by statute 7 Ann. c. 21., (which did not take place till after the decease of the late pretender,) all persons, indicted for high treason or misprision
[352] thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. (7) But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III.

[k] Fost. 229. Append. i. [l] *Ibid.* 230.

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to answer at some subsequent session, or shall receive notice of the indictment having been found twenty days before such subsequent session, then he shall plead and take his trial at such subsequent session. All these provisions are subject to the discretionary power of the court to grant further time on proper cause shewn.

(7) It has been thought proper to modify these regulations as to the trial of high treason, in cases where the overt acts laid in the indictment are assassination, or killing of the king, or any direct attempt upon his life or person, whereby his life may be endangered, or his person suffer bodily harm; in all such cases, the 39 & 40 G. 3. c. 93., enacts that the persons charged shall be indicted, arraigned, tried, and attainted in the same manner, according to the same course and order of trial in every respect, and upon the like evidence, as if they stood charged with murder: but upon conviction judgment is to be given and execution done as in other cases of high treason.

c. 53., else it had been impossible to have tried those offences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of *oyer* and *terminer* [m]. And no person indicted for felony is, or, (as the law stands) ever can be, entitled to such copies, before the time of his trial [n].

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

Challenges may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes [o]. For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; that where an alien is indicted, the jury should be *de medietate*, or half foreigners, if so many are found in the place; (which does not indeed hold in treasons [p], aliens being very improper judges of the breach of allegiance; nor yet in the case of Egyptians under the statute 22 Hen. VIII. c. 10. (8)) that on every panel there should be a competent number of hundredors; and that the particular jurors should be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*.

Challenges upon any of the foregoing accounts are [353] stiled challenges *for cause*; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones (9), there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause

[m] Fost. 250.
[n] 2 Hawk. P.C. c. 39. § 13.
[o] See Vol. III. pag. 359.
[p] 2 Hawk. P.C. c. 43. § 37. 2 Hal. P.C. 271.

(8) A similar provision in 1 & 2 Ph. & M. c. 4. with respect to Egyptians, was repealed by the 1 G. 4. c. 116.

(9) And therefore in all felonies, which in legal theory are all capital: but the rule does not extend to misdemesnors.

at all; which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn [q].

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never
[354] be tried. This reasonable boundary is settled by the common law to be the number of thirty-five, that is, one under the number of three full juries. For the law judges that five-and-thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And, therefore, it dealt with one who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or

[q] 2 Hawk. P. C. c. 43. § 2. 2 Hal. P. C. 271.

refuses his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason [r]. And so the law stands at this day with regard to treason, of any kind.

But by statute 22 Hen. VIII. c. 14. (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar. c. 10.) by this statute, I say, no person arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one, what shall be done? The old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law [s]: but the better opinion seems to be [t], that such challenge shall only be disregarded and over-ruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (or that of conviction, which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more than twenty;" the evident construction of which is, that any farther challenge shall be disallowed or prevented: and, therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes [u], till the number of twelve [355] is sworn "well and truly to try, and true deliverance make, "between our sovereign lord the king and the prisoner "whom they have in charge; and a true verdict to give, "according to the evidence."

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the

[r] 2 Hal. P. C. 268.
[s] 2 Hawk. P. C. c. 43. § 9.
[t] 3 Inst. 227. 2 Hal. P. C. 270.
[u] See Vol. III. pag. 364. But, in mere commissions of gaol delivery, no *tales* can be awarded; though the court may *ore tenus* order a new panel to be returned *instanter*. (4 Inst. 168. 4 St. Tr. 728. Cooke's Case.)

crown, or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated[w]. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular[x]) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it strictly speaking a part of our antient law: for the Mirrour[y], having observed the necessity of counsel in civil suits, "who know how to forward "and defend the cause, by the rules of law and customs of "the realm," immediately afterwards subjoins; "and more "necessary are they for defence upon indictments and appeals "of felony than upon other venial causes[z]." (10) And the

[w] 2 Hawk. P. C. c. 39. § 1.

[x] Sir Edward Coke (3 Inst. 137.) gives another additional reason for this refusal, "because the evidence to con-"vict a prisoner should be so manifest, "as it could not be contradicted." Which, lord Nottingham (when high steward) declared, (3 St. Tr. 726.) was the only good reason that could be given for it.

[y] c. 3. § 1.

[z] Father Parsons the jesuit, and after him bishop Ellys, (of English liberty, ii. 66.) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Hen. I. meaning (I presume) chapters 47 and 48 of the code which is usually attributed to that prince. "*De causis criminalibus* "*vel capitalibus nemo quaerat consilium: "quin implacitatus statim perneget, sine "omni petitione consilii.—In aliis omni-"bus potest et debet uti consilio.*"—But this *consilium*, I conceive, signifies only an *imparlance*, and the *petitio consilii* is *craving leave to imparl*; (See Vol. III. pag. 298.) which is not allowable in any criminal prosecution. This will be manifest by comparing this law with a contemporary passage in the *grand coustumer* of Normandy, (ch. 85.) which speaks of imparlances in personal actions. "*Apres ce, est tend le querelle a* "*respondre; et aura congie de soy con-*"*seiller, s'il le demande; et quand il* "*sera conseille, il peut nyer le faict dont* "*ill est accuse.*" Or, as it stands in the Latin text, (*edit.* 1539,) "*Querelatus* "*autem postea tenetur respondere; et* "*habebit licentiam consulendi, si requi-*"*rat; habito autem consilio, debet fac-*"*tum negare quo accusatus est.*"

(10) The rule extends to all felonies, but is limited to addressing the jury, it being now, I believe, considered that the prisoner has a right to the assistance of counsel for every other purpose; certainly in practice he has it without asking any permission of the court. Formerly indeed, even as to

judges themselves are so sensible of this defect, that they never scruple to allow a prisoner counsel to instruct him

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to matters of law, the prisoner was obliged himself to state his point to the court, and counsel was only assigned him if the court thought the point would bear a debate. With great deference to the author, it seems very questionable, whether, upon the whole, any alteration of the rule as now limited, would not be rather prejudicial than advantageous to the prisoner. At present, if the case be simple or unimportant, the counsel for the crown commonly abstains entirely from addressing the jury; and in all cases where he thinks it necessary to address them, his own feelings, or the interposition of the judge (seldom, if ever necessary) limit him strictly to a bare exposition of the evidence which he intends to produce: he aggravates nothing unfavourable, he omits nothing favourable to the prisoner, and he abstains from all comment or appeal to the passions. It is obvious that this dispassionate and candid mode of address could not, in the nature of things, long be preserved, if the counsel had to anticipate an answer in which every exertion of sophistry and eloquence would be deemed within the line of duty: and as the prosecutor in a vast majority of instances must have the strongest case, the fair inference assuming an equality of talent and industry will be, that his counsel would in general produce the stronger impression on the jury. But the change which must take place in the summing up of the judge would be of the most serious prejudice to the prisoner;—at present nothing having been suggested for him, it is the judge's part, a part in general most cheerfully and ably sustained, to suggest all the favourable constructions which can be put on the facts. But if a defence had already been made, that must have been made either to a clear case, or a doubtful one; a really doubtful one needs no advocate in an English court; and to a clear one, the defence must be founded in fallacy. Now it would become the duty of the judge to detect and lay open that fallacy to the jury, and thus, in spite of himself, his superior skill, accuracy, and authority, would be arrayed against the prisoner. We well know too, what is the effect on the mind, of detecting a single fallacy by which we have been led astray—a suspicion is immediately thrown upon the whole case, which it was used to support. I believe the experience of other countries, in which counsel are allowed to address juries in behalf of prisoners, fully warrants this reasoning; at the same time I am well aware of a growing feeling, and most respectable opinions against the present practice, and it is so important that not only real, but even seeming hardships, should be removed from the administration of justice, that it seems desirable to alter the present practice, if it can be done, without sacrificing the prisoner's interests or those of justice. If I might suggest the principle on which an alteration might be made, it would not be that of admitting the prisoner's counsel to plead for him, but the taking from the prosecutor his opening address, and making the whole a mere examination of evidence. By this rule, both sides would be placed on an equal footing, time would be saved, and the counsel, who are usually juniors in the profession, would be compelled to a very careful and judicious examination of the witnesses, in

what questions to ask, or even to ask questions for him, with respect to matters of fact: for as to matters of law, arising on the trial, they are *entitled* to the assistance of counsel. But, lest this indulgence should be intercepted by superior influence, in the case of state criminals, the legislature has directed by statute 7 W. III. c. 3., that persons *indicted* for such high treason as works a corruption of the blood, or misprision thereof, (except treason in counterfeiting the king's coin or seals,) may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge: and the same indulgence, by statute 20 Geo. II. c. 30., is extended to parliamentary *impeachments* for high treason, which were excepted in the former act.

The doctrine of evidence upon pleas of the crown, is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein, by several statutes, and resolutions, a difference is made between civil and criminal evidence.

First, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same. By statute 1 & 2 Ph. & Mar. c. 10. a far-

order to lay the facts intelligibly before the jury; at the same time the judge, furnished as he is beforehand with the depositions, would be fully able to supply any defects, in the course of his summing up. If to this rule it be objected that some cases which are to be proved by a long and minute chain of evidence, cannot be made intelligible to a jury without a prefatory statement, and application; in such cases I should be inclined to admit that justice required that an address to the jury on those facts in behalf of the prisoner, should, if required, be allowed. Each minute fact perhaps being capable of two bearings, and varying in consequence in its weight, ought not to be presented to the jury only in one way, or with one application; and the prisoner is no more to be compelled to take the judge for his advocate in making the other application, than he is to be debarred from his challenge to jurors, of whom he may have an unfavourable opinion. This suggests a modification of the present practice — the rule might be to have no speech on either side — the exception might be left at the option of the prosecutor's counsel, upon condition, that if he thought his evidence required to be stated and applied, the prisoner's counsel should be entitled to address the jury also.

ther exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm; and more particularly by c. 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 & 9 W. III. c. 25. and 15 & 16 Geo. II. c. 28. in their subsequent extensions of this species [357] of treason do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in such manner and form as may be had and used against offenders for counterfeiting the king's money. But by statute 7 W. III. c. 3. in prosecutions for those treasons to which that act extends, the same rule of requiring *two* witnesses is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act it hath been holden [a], that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. (11) And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour or menaces; seldom remembered accurately or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same statute 7 W. III. it is declared, that both witnesses must be to the same overt act of treason, or one to one overt

[a] Foster, 240—244.

(11) Mr. East (1 P. C. c. 2. s. 66.) controverts this doctrine, so far as it goes to exclude all extra-judicial confessions in high treason, as inadmissible evidence against the prisoner. He observes that the confession mentioned in the statute, is a confession which required no witness at all, one made in open court; that other confessions remain consequently as at common law, admissible evidence, subject only to the condition of being proved by two witnesses. This reasoning, which seems well founded, leaves in full force all that follows in the text, upon the little weight to be allowed to hasty and unguarded confessions; an observation which applies equally to all *such* confessions, whensoever or to whomsoever made.

act, and the other to another overt act, of the same species of treason [b], and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. (12) And, therefore, in sir John Fenwick's case in king William's time, where there was but one witness, an act of parliament [c], was made on purpose to attaint him of treason, and he was executed [d]. But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule [e], that those laws which condemn a man to death *in any case* on the deposition of a single witness, are fatal to liberty: and he adds this reason, that the witness who affirms, and the accused who denies, make an equal
[358] balance [f]; there is a necessity therefore to call in a third man to incline the scale. But this seems to be carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness; must these, therefore, escape unpunished? Neither indeed is the bare denial of the person accused, equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another [g]. (13) In cases of treason also there is

[b] See St. Tr. II. 144. Foster, 235.
[c] Stat. 8 W. III. c. 4.
[d] St. Tr. v. 40.
[e] Sp. L. b. 12. c. 3.
[f] Beccar. c. 13.
[g] 10 Mod. 194.

(12) The sense of this clause I take to be, that no overt act amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still if it amounteth to a direct proof of any of the overt acts which are laid, it may be given in evidence of such overt acts. Thus in Layer's case, 6 St. Tr., his corresponding with the pretender, though not laid, and though made treason by the 12th and 13th of king William, was given in evidence; for it directly tended to prove one overt act that was laid, *viz.* his conspiring to depose the king, and to place the pretender on the throne. Foster, 245. The clause of the act thus understood, provides nothing more than what common justice and sound sense have laid down as an essential rule in all criminal pleading.

(13) In the case referred to, the chief justice says, "to convict a man of perjury, a probable, a credible witness is not enough, but it must be a strong and clear evidence, and *more numerous* than the evidence given for the defendant, or else there is only oath against oath." This authority must

the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him; though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reversal of colonel Sidney's attainder by act of parliament in 1689[h] it may be collected[i], that the mere similitude of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury[j]. (14)

THIRDLY, by the statute 21 Jac. I. c. 27. a mother of a bastard child, concealing it's death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it[k]. (15)

h St. Tr. VIII. 472.
i 2 Hawk. P.C. c. 46. § 52.
j Lord Preston's case, *A.D.* 1690. St. Tr. IV. 453. Francia's case, *A.D.* 1716. St. Tr. VI. 69. Layer's case, *A.D.* 1722. *Ibid.* 279. Henzey's case, *A.D.* 1758. 4 Burr. 644.
k See pag. 198.

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must not be taken literally, for undoubtedly a jury might convict of perjury as of any other crime, on the evidence of two against that of twenty. Mr. Phillips remarks, that it does not appear to have been laid down that *two witnesses* are necessary to disprove the fact sworn to by the defendant, nor does that seem to be absolutely requisite. But at least one witness is not sufficient; and in addition to his testimony, some other independent evidence ought to be produced. Law of Evidence, vol. i. p. 148. 5th ed.

(14) On this subject I cannot do better than refer the student to Mr. Phillipps's Treatise on the Law of Evidence, vol. i. p. 486. 5th ed., where the whole subject, and particularly the evidence against Algernon Sidney, which was more than the act of parliament states, are fully considered.

(15) This statute is repealed by the 43 G. 3. c. 58., the third and fourth sections of which enact that the trial of women charged with the murder of their issue, which, born alive would have been bastard, shall proceed upon the same rules of evidence as the trial of any other murder; but that if the jury acquit of the murder, they may, in case the evidence warrants them, find that the prisoner was delivered of a child, which if born alive would have been bastard, and that she endeavoured to conceal the birth thereof. Upon this finding, the statute empowers the court to adjudge the

Fourthly, all presumptive evidence of felony should be admitted cautiously; for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And
[359] sir Matthew Hale in particular[l] lays down two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

Lastly, it was an antient and commonly received practice[m], derived from the civil law, and which also to this day obtains in the kingdom of France[n],) (16) that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered to the honour of Mary I. (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous[o],) that when she appointed sir Richard Morgan chief justice of the common pleas, she injoined him, "that "notwithstanding the old error, which did not admit any "witness to speak, or any other matter to be heard, in favour "of the adversary, her majesty being party; her highness's "pleasure was, that whatsoever could be brought in favour of "the subject should be admitted to be heard: and moreover, "that the justices should not persuade themselves to sit in

[l] 2 Hal. P. C. 290.
[m] St. Tr. I. *passim*.
[n] Domat. publ. law. b. 3. t. 1. Montesq. Sp. L. b. 29. c. 11.
[o] See pag. 17.

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the prisoner to be committed to prison for any term not exceeding two years.

(16) By the present French law, the prisoner not only may, but, I believe, must have counsel; that is, if he makes no choice for himself, the judge must assign him one, or the whole proceedings will be void. *Code d'Instruction Criminelle*, l. ii. s. 294. He is entitled also to witnesses produced at his own expence, in every stage of the proceedings. *Ibid.* l. ii. s. 153. 190. 315. 321.

"judgment otherwise for her highness than for her subject[p]."
Afterwards, in one particular instance, (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4.) it was provided, that any person impeached for such felony, "should be received and admitted to make any lawful "proof that he could, by lawful witness or otherwise, for his "discharge and defence:" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath[q]: the consequence [360]
of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke[r] protests very strongly against this tyrannical practice; declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as *scintilla juris* against it[s]. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland[t], when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it[u] against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland[w], "that in all such trials for the better discovery of "the truth, and the better information of the consciences of "the jury and justices, there shall be allowed to the party "arraigned the benefit of such credible witnesses to be ex-"amined upon oath as can be produced for his clearing and "justification." (17) At length by the statute 7 W. III. c. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was after-

[p] Hollingsh. 1112. St. Tr. I. 72.
[q] 2 Bulst. 147. Cro. Car. 292.
[r] 3 Inst. 79.
[s] See also 2 Hal. P. C. 283. and his summary, 264.
[t] Stat. 4 Jac. I. c. 1.
[u] Com. Journ. 4, 5. 12, 13. 15. 29. 30 Jun. 1607.
[w] *Ibid.* 4 Jun. 1607.

(17) In the ordinance against incest, adultery, and fornication alluded to, p. 65., it was enacted, that the parties indicted under it, might produce witnesses, whom the court were authorized to examine on oath. Scobell. 1650. 10. p. 122.

wards declared by statute 1 Ann. st. 2. c. 9. that in all cases of treason and felony all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.

WHEN the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity[x]) till they have given in their verdict (18); but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case which touches life or member, give a *privy* verdict[y]. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the
[361] verdict in open court[z]. And such public or open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *chuse* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the king; but not at the suit of the prisoner[a]. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal; and is treated as such by sir Thomas Smith, two hundred years ago; who accounted "such doings to be very "violent, tyrannical, and contrary to the liberty and custom

[x] Co. Litt. 227. 8 Inst. 110. Fost. 27. Gould's case, Hil. 1764.

[y] 2 Hal. P. C. 300. 2 Hawk. P. C. c. 47. § 2.

[z] 3 St. Tr. 731. 4 St. Tr. 231. 455. 485.

[a] 2 Hal. P. C. 310.

(18) The court may of its own authority adjourn criminal cases, where such adjournment becomes necessary for the ends of justice; but the jury are then to be placed under the charge of bailiffs sworn to keep them together, and suffer no access to them. See *R.* v. *Stone*, 6 T. R. 530.

"of the realm of England[z]." For, as sir Matthew Hale well observes[a], it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions;—unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances[b], where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench: for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first[c]. (19.)

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation[d], except he be appealed of felony within the time limited by law. And upon such his acquittal or discharge for want of prosecution, he [362] shall be immediately set at large without payment of any fee to the gaoler[e]. (20) But if the jury find him guilty[f], he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country.

[z] Smith's Commonw. l. 3. c. 1.

[a] 2 Hal. P.C. 313.

[b] 1 Ley. 9. T. Jones, 163. St. Tr. X. 416.

[c] 2 Hawk. P.C. c. 47. § 12.

[d] The civil law in such case only discharges him from the same accuser, but not from the same accusation. *Ff.* 48. 2. 7. § 2.

[e] Stat. 14 Geo. III. c. 20.

[f] In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something peculiarly delicate; not that he was guilty, but that he had not been enough upon his guard: "*parum cavisse videtur.*" (*Festus*, 325.)

(19) There have been a few cases in which, the matter being really of a civil nature, such as the liability to repair a road or bridge, though the form of the proceeding was criminal, the court has in fact, though not in form, granted a new trial after a verdict of acquittal. The mode of doing this has been by staying the entry of the judgment upon the verdict, till the prosecutor has preferred, and tried a second indictment; by which means the defendant is prevented from pleading the former acquittal in bar. These cases have been few, and granted only under special circumstances. See them referred to in *R.* v. *Wandsworth*, 1 B. & A. 63.

(20) But in cases of misdemesnor he is compelled to the payment of certain fees to the officers of the court, the justice of which is not very obvious.

When the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bona fide* prosecution) for any grand or petit larciny or other felony, the reasonable expenses of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are by statutes 25 Geo. II. c. 36. and 18 Geo. III. c. 19. to be allowed him out of the county stock, if he petitions the judge for that purpose: and by statute 27 Geo. II. c. 3. explained by the same statute 18 Geo. III. c. 19., all persons appearing upon recognizance or *subpœna* to give evidence [for the crown,] whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loss of time. (21) 2. On a conviction of larciny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again[i]. But, it being considered that the party prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts, that if any person be convicted of larciny, by the evidence of the party robbed, [the owner of the goods, or any other by their procurement,] he shall have full restitution of his money, goods, and chattels; or the
[363] value of them out of the offender's goods, if he has any, by a writ to be granted by the justices. And the construction of this act having been in great measure conformable to the law of appeals, it has therefore in practice superseded the use of appeals of larciny. For instance, as formerly upon appeals[k], so now upon indictments of larciny, this writ of restitution shall reach the goods so stolen, notwithstanding

[i] 3 Inst. 242. [k] Bracton, *de coron.* c. 32.

(21) It is much to be regretted that these salutary acts are not extended to cases of misdemesnor, in which very often equal hardship to the individual, and equal benefit to the public, arise from the prosecution as in cases of felony. One of the evil consequences is mentioned at p. 364.

the property[j] of them is endeavoured to be altered by sale in market overt[k]. And though this may seem somewhat hard upon the buyer, yet the rule of law is that "*spoliatus debet*, "*ante omnia*, *restitui*;" especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. (22) And it is now usual for the court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods, as are brought into court to be made to the several prosecutors. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them[l], unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not before prosecution: for so felonies would be made up and healed[m]: and also recaption is unlawful, if it be done with intention to smother or compound the larciny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter[n].

It is not uncommon, when a person is convicted of a misdemesnor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for

[j] See Vol. II. pag. 450.
[k] 1 Hal. P. C. 543.
[l] See Vol. III. pag. 4.
[m] 1 Hal. P. C. 546.
[n] See pag. 133.

(22) It should seem that the sale in market overt to a *bonâ fide* purchaser, between the original taking and the attainder of the felon, does operate a sort of conditional change of the property; for the owner can only sue for the value of the goods any person in possession of them, at or after the conviction; in the interval they are not the property of the original owner, but of the vendee; and if that vendee dispose of them before attainder, though with notice of the felony, he is not liable. *Horwood* v. *Smith*, 2 T. R. 750. Nor does the statute extend to goods obtained from the owner merely by fraud, without larciny.

the court to permit the defendant to *speak with the prosecutor*
[364] before any judgment is pronounced; and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice; and though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter-sessions; where prosecutions for assaults are by these means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all, it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by these means, the rules of evidence are entirely subverted: the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay, even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. "This," says an elegant writer [o], (who pleads with equal strength for the *certainty* as for the *lenity* of punishment,) "may be an act of good-nature and humanity, "but it is contrary to the good of the public. For, although "a private citizen may dispense with satisfaction for his "private injury, he cannot remove the necessity of public "example. The right of punishing belongs not to any one "individual in particular, but to the society in general, or the "sovereign who represents that society; and a man may "renounce his own portion of this right, but he cannot give "up that of others."

[o] Becc. ch. 46.

CHAPTER THE TWENTY-EIGHTH.

OF THE BENEFIT OF CLERGY.

AFTER trial and conviction, the judgment of the court regularly follows unless suspended or arrested by some intervening circumstance; of which the principal is the *benefit of clergy*: a title of no small curiosity as well as use; and concerning which I shall therefore enquire: 1. Into its original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. CLERGY, the *privilegium clericale*, or in common speech, *the benefit of clergy*, had its original from the pious regard paid by Christian princes to the church in its infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds; 1. Exemption of *places*, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

BUT the clergy increasing in wealth, power, honour, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right: and as a right of the highest nature, indefeasible, and *jure divino*[a].

[a] The principal argument upon which they founded this exemption was that text of Scripture; "Touch not mine "anointed, and do my prophets no "harm." (Keilw. 181.)

By their canons therefore, and constitutions, they endeavoured at, and where they met with easy princes, obtained a vast extension of these exemptions; as well in regard to the crimes themselves, of which the list became quite universal[b]; as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

In England, however, although the usurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy[c]: and therefore, though the antient *privilegium clericale* was in *some* capital cases, yet it was not *universally* allowed. And in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty[d]: till at length it was finally settled in the reign of Henry the sixth, that the prisoner should first be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arresting judgment. This latter way is most usually practised, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury: and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all. (1)

Originally the law was held, that no man should be admitted to the privilege of clergy but such as had the *habitum et tonsuram clericalem*[e]. But in process of time a much [367] wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those

[b] See Vol. III. pag. 62.
[c] Keilw. 180.
[d] 2 Hal. P. C. 377.
[e] 2 Hal. P. C. 372. M. Paris, *A.D.* 1259. See Vol. I. pag. 24.

(1) See ante, p. 333. n. (1).

days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by statute 4 Hen. VII. c. 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs that no person once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1. and 32 Hen. VIII. c. 3., but it is held[f] to have been virtually restored by statute 1 Edw. VI. c. 12. which statute also enacts, that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand,) for all offences then clergyable to commoners, and also for the crimes of house-breaking, highway-robbery, horse-stealing, and robbing of churches. (2)

[f] Hob. 294. 2 Hal. P. C. 375.

(2) The term peer includes peeresses also. See the case of duchess of Kingston. 11 St. Tr. 262.

This is one of the very few cases of privilege retained in the English law; and of all privileges, that of impunity in the commission of crime, is the most disgraceful to those who enjoy it, and the most odious to those who are debarred from it. By this law a peer may, at this day, rob on the highway, steal horses once, break a house, or rob a church (crimes capital in a commoner,) and is liable to no personal punishment whatever.

After this burning, the laity, and before it the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession [f]. This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance [g]. A learned judge, in the beginning of the last century [h], remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

This scandalous prostitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and
[369] notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione faciendâ*: in which situation the clerk convict could not make

[f] Staundford, P. C. 138. *b*.
[g] 3 P. Wms. 447. Hob. 289.
[h] Hob. 291.

purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As therefore these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law, it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony. (3)

ACCORDINGLY the statute of 18 Eliz. c. 7. enacts, that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued for above a century, unaltered, except only that the statute of 21 Jac. I. c. 6.

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(3) Mr. Barrington observes very truly, that we are not to judge of the propriety of the Benefit of clergy, by the present state of the country; and points out that while it was confined in its objects to actual priests, the inconvenience was far less than is commonly supposed, because such crimes only were within the benefit as a munificently provided priesthood had little temptation to commit. Lord Hobart, in a case which is full of learning and curious information on the subject, says, "the benefit of clergy is a refuge provided by *common law* in favour of learning to save the life of an offender literate in certain cases; (though I will not deny but that it took its original by occasion of the canon law, and in favour of the church) and was ever ruled, not by any fixed canon law, but ordered and qualified by the king's court, according to conveniency. As the king's courts did extend it beyond the canon law, so did they straiten it, and deny it in cases, and persons, and times where the canon law did grant it."

It is obvious, indeed, that by the forfeiture of goods which attended clergy, and the power of forbidding purgation, the courts on the one hand were able in almost every case, to impose a punishment adequate to the offence; and on the other to prevent that complication of perjury, and that mockery of justice, which the author so strongly complains of. Barr. Obs. 443. 4th ed. *Searle* v. *Williams*, Hob. 288. See also the answers of the judges to the lords, delivered by the chief baron on the subject of clergy, in the Duchess of Kingston's trial. 11 St. Tr. 263.

allowed, that women convicted of simple larcinies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the *hand*, being found ineffectual, was
[370] also changed by statute 10 & 11 W. III. c. 23. into burning in the most visible part of the left *cheek*, nearest the nose: but such an indelible stigma being found by experience to render offenders desperate, this provision was repealed, about seven years afterwards, by statute 5 Ann. c. 6., and till that period, all women, all peers of parliament and peeresses, and all male commoners who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female, upon branding; and peers and peeresses without branding, for the first offence: yet all liable (excepting peers and peeresses), if the judge saw occasion, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

Afterwards, indeed, it was considered, that education and learning were no extenuations of guilt, but quite the reverse: and that, if the punishment of death for simple felony was too severe, for those who had been liberally instructed, it was *a fortiori*, too severe for the ignorant also. And therefore by the same statute 5 Ann. c. 6. it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit. And experience having shewn that so very universal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none) was as much too gentle; it was further enacted by the same statute, that when

any person is convicted of any theft, or larciny, and burnt in the hand for the same according to the antient law, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour, for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted by the statute 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any persons shall be convicted of any larciny, either grand or petit, or any felonious stealing or taking of [371] money or goods and chattels either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America, (or by statute 19 Geo. III. c. 74. to any other parts beyond the seas) for seven years; and, if they return or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy. And by the subsequent statutes 16 Geo. II. c. 15. and 8 Geo. III. c. 15. many wise provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress them. But now, by the statute 19 Geo. III. c. 74. all offenders liable to transportation may in lieu thereof, at the discretion of the judges, be employed, if males, (except in the case of petty larciny,) in hard labour for the benefit of some public navigation (4); or whether

(4) The 5 G. 4. c. 84. repeals the 16 G. 2. c. 15. and 8 G. 3. c. 15. as well as several other later statutes, so far as regards the present subject: its object is twofold, to regulate what is called, the punishment of the hulks, and that of transportation. The first of these was introduced by the 16 G. 3. c. 43., a temporary act, when the disturbances in the American colonies had interrupted the transportation of convicts to that country. The 19 G. 3. c. 74. was also temporary as far as regarded the hulks, and for many years confinement in them has ceased to be a punishment, which may be formally pronounced for any offence; but male offenders under sentence of death, and reprieved during pleasure, or under sentence of transportation, have been, and by the recent act still may be, sent to them temporarily, or until transportation; and it very commonly happens, that those, who are sentenced to transportation for seven years only, pass the whole of the period in the hulks. In 1812, a report upon the

males or females, may in all cases be confined to hard labour in certain penitentiary houses, to be erected by virtue of the

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the state of the hulks was made to the house of commons by the committee then sitting on the laws relating to penitentiaries, and in consequence of their suggestions, several useful measures of reform and regulation were adopted. These are carried on by the recent act: each hulk is placed under an overseer, who is to reside in it, with a sufficient number of officers and guards; he is invested with the same power as a gaoler over his prisoners, like him is answerable for their escape; may inflict moderate punishment for disorderly conduct, is to see them fed and clothed, and to keep them to labour according to his instructions. Over the whole is placed a superintendant, (with an assistant or deputy if necessary) who is to inspect them all minutely four times in the year at least, ascertain their condition, examine into the behaviour both of the overseers and prisoners, the amount of the earnings, and the expences of the establishment; upon all which he is to make two reports at least in the year to the secretary of state, which are to be laid before parliament. Under these regulations, the hulks are a species of prison, equal perhaps to any other in respect of health, and superior in point of economy; but they must always remain inferior in the capability of inspection, and classification, and in all the means of preserving that perpetual and watchful discipline, from which alone, if from any thing, the reformation of offenders may be expected.

With respect to transportation the act seeks to revive what was much declining in the minds of the lower orders, the salutary terror once inspired by this mode of punishment. The convict under sentence may now be kept to hard labour in prison or the hulks before he sails; during the voyage his misbehaviour may be punished by the surgeon of the ship, according to authority given by the secretary of state; upon his landing, the governor of the colony acquires a property in his service, and may assign him over to any other person; such assignee thereby acquiring the same property and power of re-assignment.

On the other hand, in protection of the convict, no punishment during the passage is to be inflicted on him by the surgeon, except with the approbation in writing of the master or principal officer of the ship; and the punishment with such approbation, and the particulars of the offence must be entered the same day on the ship's log-book, under a penalty of 20*l*. Further, as meritorious convicts under remission of labour from the governor, have sometimes by their industry acquired property, the statute protects such persons in the enjoyment of it, and gives them a right of action for the recovery of it, and for any injury sustained by them.

Some provision of this kind was necessary, as will be seen by considering a case that has arisen under the 30 G. 3. c. 47. By this statute his majesty is empowered to authorize the governor or lieutenant-governor of any place to which convicts are transported to remit either absolutely or conditionally the whole or any part of their term of transportation; which remission is to be of the same effect as if his majesty had signified his intention of mercy under the sign manual. And the names of such convicts are to be inserted in the next general pardon which shall pass the great seal.

said act, for the several terms therein specified, but in no case exceeding seven years; with a power of subsequent mitigation, and even of reward, in case of their good behaviour. But if they escape and are retaken, for the first time an addition of three years is made to the term of their confinement; and a second escape is felony without benefit of clergy.

In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanliness, and medical assistance; by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every Christian and moral duty. And if the whole of this plan be properly executed, and it's defects be timely supplied, there is reason to hope that such a reformation may be [372] effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes. (5)

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seal. In the interval, a convict whose term of transportation has been thus shortened, remains, supposing his offence to have been capital, an attainted felon, with none of his rights or capacities restored to him; because he has not served his time out, which of itself would have operated as a pardon; nor has he received a pardon under the great seal, which alone would be an effectual one for that purpose. *Bullock* v. *Dodds*, 2 B. & A. 258.

(5) This act was drawn up by or under the direction of the author, with the advice and concurrence of Howard. It was not, however, till 1816, that a national penitentiary was built on a large scale at Millbank, which in the early part of 1823, contained nearly 900 prisoners. About that time a very alarming sickness made its appearance amongst them; the prison was temporarily evacuated, and though now in a state to receive convicts, it may naturally be supposed that such an event was a material derangement and interruption to the plans there pursued for the reformation of offenders. Sufficient time has not yet elapsed to afford the system a fair trial; but it may be fairly said, that so far as the present evidence of experience goes, there is nothing to destroy the reasonable hopes of it's advocates. The acts which more particularly regulate the penitentiary are the 56 G. 3. c. 63. and 59 G. 3. c. 136.

It is also enacted by the same statute, 19 Geo. III. c. 74., that instead of burning in the hand, (which was sometimes too slight, and sometimes too disgraceful a punishment) the court in all clergyable felonies may impose a pecuniary fine; or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and in case of female offenders, in the presence of females only. (6) Which fine or whipping shall have the same consequences as burning in the hand; and the offender so fined or whipped, shall be equally liable to a subsequent detainer or imprisonment.

In this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect, that however in times of ignorance and superstition, that monster in true policy, may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of it's laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross, as must destroy it's very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to
[373] the united will of the community. This united will is de-

(6) The 57 G. 3. c. 75. abolished the punishment of *publicly* whipping females, and the 1 G. 4. c. 57. repealed that act, and enacted, that female offenders should not suffer the punishment either of public or private whipping.

clared in the laws of the land: and that united force is exerted in their due and universal execution.

II. I AM next to inquire, to what *persons* the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other,) to be admitted to this privilege, and immediately discharged; and this as often as they offend [i]. (7) Again, all lords of parliament and peers of the realm having place and voice in parliament, by the statute 1 Edw. VI. c. 12. (which is likewise held to extend to peeresses [k]) shall be discharged in all clergyable and other felonies provided for by the act, without any burning in the hand or imprisonment, or other punishment substituted in it's stead, in the same manner as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of some navigation; or in case of larciny, upon being transported for seven years, if the court shall think proper. (8)

[i] 2 Hal. P.C. 375.

[k] Duchess of Kingston's case in parliament, 22 Apr. 1776.

(7) By virtue of this privilege, which it cannot be desirable for the clergy to retain, they have a total immunity from all corporal punishment, for any felony from which clergy was not taken away by the 1 E. 6. c. 12., nor has been by any later statute, except petty larciny, in which, as no clergy was ever demandable or necessary, the crime not being capital, there is no distinction between their responsibility and that of laymen. Thus in the highest and lowest offences they are punishable as other men; in the large class of offences between the two (subject to the exception above mentioned) they are privileged: a state of things not to be very well justified in reason, and to be accounted for only by the historical deduction of the law in the text.

(8) If a layman having once received the benefit of clergy, pleads or prays the benefit of it a second time, the crown must counter-plead, shewing

It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6. as being under a legal incapacity for orders[l]. But I much question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are
[374] still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. The third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason nor in petit larciny, nor in any mere misdemesnors, it was indulged at the common law; and therefore we may lay it down for a rule that it was allowable only in petit treason and capital felonies; which for the most part became legally entitled to this indulgence by the statute *de clero*, 25 Edw. III. st. 3. c. 4., which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country[m]; and *combustio domorum*, or arson, that is, the burning of houses[n]: all which are a kind of hostile acts, and in some degree border upon treason. And farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which

[l] 2 Hal. P. C. 373. 2 Hawk. P. C. c. 33. § 5. Fost. 306.

[m] 2 Hal. P. C. 333.

[n] 2 Hal. P. C. 346.

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shewing the prisoner's identity, the former indictment, and the former allowance; to this the prisoner replies, and the sheriff returns a jury instanter, who are liable to challenge, and who try the issue joined between them. Scott's case, 1 Leach. C. C. 401.

they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law, to the same rigor of capital punishment in the first offence, that it exerted, before the *privilegium clericale* was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in statute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any case whatsoever: yet, when offences are committed within the [379*] admiralty jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner [o]. (9) And, to conclude this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament [p]. 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute [q]. 3. That when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary,) a principal in the second degree being present, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the *persons committing* the offence, (as in the case of stabbing, or committing larciny in a dwelling-house (10), or privately from the person,) his aiders and abettors are not excluded; through the tenderness of the

[o] Moor, 756. Fost. 288.
[p] 2 Hal. P.C. 330.
[q] 2 Hawk. P.C. c. 33. § 26.

(9) By the 39 G. 3. c. 37. this defect in the law is supplied; it enacts, that all offences committed on the high seas shall be considered respectively of the same nature, and liable to the same punishments, as if committed on shore; and the act particularly specifies, that persons tried for murder or manslaughter at sea, and found guilty of manslaughter, shall be entitled to clergy. This last provision was needlessly re-enacted only four years after by the 43 G. 3. c. 113. s. 6.; a strong instance, if any were needed, of the inconvenient bulk and confusion of our statute book.

(10) See ante, p. 240.

law, which hath determined that such statutes shall be taken literally [r].

IV. Lastly, we are to inquire what the consequences are to the party, of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

And, we may observe, 1. That by this conviction he forfeits all his goods to the king; which being once vested in the crown, shall not afterwards be restored to the offender [s].
[374*] 2. That, after conviction, and till he receives the judgment of the law, by branding, or some of it's substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon [t]. 3. That after burning, or it's substitute, or pardon, he is discharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded; and this by statutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning or it's substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted [u]. 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in it's stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it [x].

[r] 1 Hal. P. C. 529. Fost. 356, 357.
[s] 2 Hal. P. C. 388.
[t] 3 P. Wms. 487.
[u] 2 Hal. P. C. 389. 5 Rep. 110.
[x] 2 Hal. P. C. 389, 390.

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CHAPTER THE TWENTY-NINTH.

OF JUDGMENT AND IT'S CONSEQUENCES.

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemesnors, as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemesnor, (the trial of which may, and does usually, happen in his absence, after he has once appeared,) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again[a]. And we may take notice, 1. That none of the statutes of *jeofails*[b], for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. (1) 2. That, in favour

[a] 4 Rep. 45. [b] See Vol. III. p. 407.

(1) This sentence is taken from sir Matthew Hale, but the reasoning seems

of life, great strictness has at all times been observed, in
[376] every point of an indictment. Sir Matthew Hale indeed complains, "that this strictness is grown to be a blemish and "inconvenience in the law, and the administration thereof: "for that more offenders escape by the over-easy ear given "to exceptions in indictments, than by their own innocence[c]." And yet no man was more tender of life than this truly excellent judge.

A PARDON also, as has been before said, may be pleaded in arrest of judgment, and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.* the saving the attainder, and of course the corruption of blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

PRAYING the benefit of clergy may also be ranked among the motions in arrest of judgment: of which we spoke largely in the preceding chapter.

IF all these resources fail, the court must pronounce that judgment, which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace, are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive (2), beheading, and quartering; and in murder, a

[c] 2 Hal. P. C. 193.

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seems defective, for where the verdict in civil cases cures defects, it is by a common-law intendment, without reference to the statutes. See Vol. III. p. 394. n. (4). The position, however, is true, and the reason for it, in cases where the verdict would have aided the defect at common law, may be found in the following sentence of the text.

(y) See ante, p. 93. n. (17).

public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such parts of these judgments, as savour of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; [377] and there being very few instances (and those accidental or by negligence) of any person's being embowelled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines: and, lastly, there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes, as either arise from indigence, or render even opulence disgraceful. Such as whipping, hard labour in the house of correction or otherwise, the pillory, the stocks, and the ducking-stool. (3)

(3) With respect to the alteration of some, and the abolition of other punishments, see the notes *ante*, at pp. 93, 123. In spite of the numerous repeals of statutes inflicting capital punishments, so many cases still occur, in which it would be necessary to pronounce the sentence of death, without any intention of putting it in execution, that the 4 Geo. 4. c. 48. has empowered the court in all such cases, simply to record the judgment of death without formally pronouncing it. This has certainly this beneficial effect, that the sentence being now only pronounced where it is intended to carry it into effect, is heard but seldom, at least in the country, and always produces the natural and proper impression. But the measure, perhaps, would have been more perfect, if the court had been allowed at once to declare the punishment, which the convict was to suffer; it would have served to connect the ideas of guilt and punishment more closely in the minds of the audience, if they who had witnessed the trial had immediately heard also the natural conclusion of it.

The diminution of the frequency of capital punishments is quite consistent

Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on
[378] the other it stifles all hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

The discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, *viz.* by fine or imprisonment, is, in these cases, fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by an invariable law. The value of money itself

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with, indeed must often occasion, an increased severity in the administration of other punishments, and some increase has been thought necessary; accordingly by the 53 Geo. 3. c. 162. it is enacted, that in all cases of conviction for any clergyable felony, grand or petit larceny, the court may sentence to imprisonment, with hard labour, either alone, or in addition to any other punishments already attached to such offences respectively. And the 3 Geo. 4. c. 114., following up the same principle, extends the act to a great many enumerated cases of aggravated misdemesnor.

changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five-and-twenty *denarii*: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine in general, without specifying the certain sum; which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but it's discretion is regulated by law. For the bill of rights[d] has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second:) and the same statute farther declares, that all grants and [379] promises of fines and forfeitures of particular persons before conviction, are illegal and void. Now the bill of rights was only declaratory of the old constitutional law: and accordingly we find it expressly holden, long before[e], that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

THE reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna charta*, c. 14. concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo* "*delicto, nisi secundum modum ipsius delicti; et pro magno delicto,* "*secundum magnitudinem delicti; salvo contenemento suo; et* "*mercator eodem modo, salva mercandisa sua; et villanus eodem* "*modo amercietur, salvo wainagio suo.*" A rule that obtained even in Henry the second's time[f], and means only, that no

[d] Stat. 1 W. & M. st. 2. c. 2.
[e] 2 Inst. 48.
[f] Glanv. l. 9. c. 8. & 11.

man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms ("*sit in misericordia*"), shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute Westm. 1. c. 18.; and then the judges estreated them into the exchequer[g]. But in the court leet and court baron it is still performed by *affeerors*, or suitors sworn to *affeere*, that is, tax and moderate the *general* amercement according to the *particular* circumstances of the offence
[380] and the offender[h]. Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a peculiar mulct was inflicted by them on a stranger (not being party to any suit) it was then denominated a *fine*[i]; and the antient practice was, when any such fine was imposed, to inquire by a jury "*quantum* "*inde regi dare valeat per annum, salva sustentatione sua, et* "*uxoris, et liberorum suorum*[j]." And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine[k]: according to an antient maxim, *qui non habet in crumena luat in corpore*. Yet, where any statute speaks both of fine and ransom, it is holden that the ransom shall be treble to the fine at least[l].

[g] F.N.B. 76.

[h] The affeeror's oath is conceived in the very terms of *magna charta*. Fitzh. Survey, ch. 11.

[i] 8 Rep. 40.

[j] Gilb. Exch. c. 5.

[k] Mirr. c. 5. § 8. Lamb. *Eirenarch.* 575.

[l] Dyer, 232.

WHEN sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is *attainder*. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of it's protection, and takes no farther care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court: neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law[m]. This is after *judgment*: for there is great difference between a man *convicted* and *attainted*; though they are frequently through inaccuracy confounded together. After conviction only a [381] man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

THE consequences of attainder are forfeiture and corruption of blood.

I. FORFEITURE is twofold; of real and personal estates. First, as to real estates: by attainder in high treason[n] a man

[m] 3 Inst. 213.

[n] Co. Litt. 392. 3 Inst. 19. 1 Hal. P. C. 240. 2 Hawk. P. C. c. 49. § 1.

forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands and tenements which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances, but not those before the fact: and therefore a wife's jointure is not forfeitable for the treason of her husband; because settled upon her previous to
[382] the treason committed. But her dower is forfeited by the express provision of statute 5 & 6 Edw. VI. c. 11. And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason[p] (4): for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands: for he never was attainted of treason[q]. But if the chief justice of the king's bench (the supreme coroner of all England) in person, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited[r].

The natural justice of forfeiture or confiscation of property, for treason[s], is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society: and

[o] 1 Hal. P.C. 360.
[p] 1 Hal. P.C. 359.
[q] Co. Litt. 13.
[r] 4 Rep. 57.
[s] See Vol. I. pag. 299.

(4) That is, if the treason were committed *after* the issue born. 1 Hale, P.C. 359. But as the woman is incapable of having issue inheritable after the treason committed, the attainder relating backwards to the time of the act done, the husband cannot, after that time, perform the condition which alone entitles him in any case to be tenant by courtesy. See Book II. p. 128.

hath no longer any right to those advantages, which before belonged to him purely as a member of the community: among which *social* advantages, the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending: according to that beautiful sentiment of Cicero[s], "*nec vero* "*me fugit quam sit acerbum, parentum scelera filiorum poenis* "*lui: sed hoc praeclare legibus comparatum est, ut caritas libe-* "*rorum amiciores parentes reipublicae redderet.*" And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants; his old age and his want of children: [383] for children are pledges to the prince of the father's obedience[t]. Yet many nations have thought, that this posthumous punishment savours of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but that of treason thought it more just, "*ibi esse poenam, ubi et noxa est;*" and ordered that "*peccata* "*suos teneant auctores, nec ulterius progrediatur metus, quam* "*reperiatur delictum*[v]:" and Justinian also made a law to restrain the punishment of relations[u], which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital punishment of treason, not only to the children, but to all the relations of the delinquent[w]: and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle[x], (copied almost *verbatim* from Justinian's code[y],) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *par-*

[s] *ad Brutum, ep.* 12.
[t] Gravin. 1. § 68.
[v] *Cod.* 9. 47. 22.
[u] *Nov.* 134. c. 13.
[w] Qu. Curt. *l.* 6.
[x] *cap.* 24.
[y] *l.* 9. *t.* 8. *l.* 5.

ticular bounty. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour ecclesiastical or civil: "to the end that, being always poor "and necessitous, they may for ever be accompanied by the "infamy of their father: may languish in continual indigence; "and may find (says this merciless edict) their punishment in "living, and their relief in dying."

With us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feodal policy, (as has been already observed[z],) but was antecedent to the establishment of that system in this island; being
[384] transmitted from our Saxon ancestors[a], and forming a part of the antient Scandinavian constitution[b]. But in certain treasons relating to the coin, (which, as we formerly observed, seem rather a species of the *crimen falsi*, than the *crimen laesae majestatis*,) it is provided by some of the modern statutes[c] which constitute the offence, that it shall work no forfeiture of lands, save only for the life of the offender; and by all, that it shall not deprive the wife of her dower[d]. And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann. c. 21. that, after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat singular and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many respects different from that of treason in England; and particularly in it's consequence of forfeitures of entailed estates, which was more peculiarly English; yet it seemed necessary, that a crime so nearly affecting government should, both in it's essence and consequences, be put upon the same footing in both parts of the united kingdoms. In new-modelling these laws, the Scotch nation and the English house of commons

[z] See Vol. II. pag. 251.
[a] *LL. Aelfr. c. 4. Canut. c. 54.*
[b] Stiernh. *de jure Goth. l. 2. c. 6. & l. 3. c. 3.*
[c] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.
[d] *Ibid.* 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

struggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood; which the house of lords as firmly resisted. At length a compromise was agreed to, which is established by this statute, *viz.* that the same crimes, and no other, should be treason in Scotland that are so in England; and that the English forfeitures and corruption of blood should take place in Scotland till the death of the then pretender; and then cease throughout the whole of Great Britain[e]: the lords artfully proposing this temporary clause, in hopes (it is said[f]) that the prudence of [385] succeeding parliaments would make it perpetual[g]. This has partly been done by the statute 17 Geo. II. c. 39. (made in the year preceding the late rebellion), the operation of these indemnifying clauses being thereby still farther suspended, till the death of the sons of the pretender[h]. (5)

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and, after his death, all his lands and tenements in fee simple (but not those in tail) to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's *year, day,* and *waste*[i]. Formerly the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel[k] and Ezra[l]; which, besides the pain of death inflicted on the delinquents there specified, ordain, "that their houses shall be made a dunghill." But this

[e] Burnet's Hist. *A. D.* 1709.

[f] Considerations on the law of forfeiture, 6.

[g] See Fost. 250.

[h] The justice and expediency of this provision were defended at the time with much learning and strength of argument in the *considerations on the law of forfeiture,* first published *A. D.* 1744. (See Vol. I. pag. 244.)

[i] 2 Inst. 37.

[k] ch. iii. v. 29. [l] ch. vi. v. 11.

(5) The 39 Geo. 3. c. 93. repeals entirely this provision of the statute of Anne, so that the law of forfeiture in high treason now stands as before the passing of that act.

tending greatly to the prejudice of the public, it was agreed, in the reign of Henry the first, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit [m]: and therefore *magna carta* [n] provides, that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee; without any mention made of waste. But the statute 17 Edw. II. *de praerogativa regis* seems to suppose, that the king shall have his
[386] year, day, *and* waste; and not the year and day *instead of* waste. Which sir Edward Coke (and the author of the mirror, before him) very justly look upon as an encroachment, though a very antient one, of the royal prerogative [o]. This year, day, and waste, are now usually compounded for; but otherwise they regularly belong to the crown; and, after their expiration, the land would naturally have descended to the heir, (as in gavelkind tenure it still does,) did not it's feodal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon [p]. They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities. (6)

[m] Mirr. c. 4. § 16. *Flet. l.* 1. *c.* 28.
[n] 9 *Hen. III. c.* 22.
[o] Mirr. c. 5. § 2. 2 Inst. 37.
[p] 3 Inst. 55.

(6) In explaining the principle of forfeiture in treason, sir Martin Wright says, "that the law hath inflicted a penalty somewhat of the like kind upon the mesne lord, even where the tenant is guilty of felony only; for though the land escheats as by the feudal law, it ought to the immediate lord; yet as the crime affects the public peace, and the lord may be supposed for want of due care in the choice of his tenant to be in some measure blameable, the king shall have the land a year and day to the prejudice of the lord." And he cites a passage from *Le Stille de proceder en Normandie*, fol. 76., which shows that a similar usage prevailed there; *se l'homme est condemné par la justice du Roy, le Roy doibt avoir la premiere année de la revenue des heritaiges au condemné.* On Tenures, p. 119. The

THESE are all the forfeitures of real estates, created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of *præmunire* and others; because I look upon them rather as a *part* of the judgment and penalty, inflicted by the respective statutes, than as *consequences* of such judgment; as in treason and felony they are. But I shall just mention, as a part of the forfeiture of real estates, the forfeiture of the profits of lands during life: which extends to two other instances, besides those already spoken of; misprision of treason [q], and striking in Westminster-hall, or drawing a weapon upon a judge there, sitting in the king's courts of justice [r].

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treason or misprision thereof, petit treason, felonies of all sorts, whether clergyable [387] or not, self-murder or felony *de se*, petit larciny, standing mute, and the above-mentioned offences of striking, *&c.* in Westminster-hall. For *flight* also, on an accusation of treason, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels: for the very flight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But the jury very seldom find the flight [s]: forfeiture being looked upon, since the vast increase of personal property of late years, as too large a pe-

[q] 3 Inst. 218.
[r] *Ibid.* 141.
[s] Staundf. P. C. 183. b.

tendency of this, contrary to the learned judge's opinion, seems to be to account for forfeitures on something like a feudal principle; but practically it is much more convenient to consider them wholly distinct; in both treason and felony the natural consequence of corruption of blood would be escheat, but in treason the forfeiture intercepts entirely the right of the lord, as in felony the escheat intercepts that of the heir, to whom, if there had been no corruption of blood, the land would have reverted after the year and day. See Vol. II. p. 251. Nothing can prove more clearly how entirely distinct they are in practice, than the consideration that in the case of treasons, wherein by statutes the corruption of blood is taken away, so that there can be no escheat, forfeiture still remains. See sir S. Lovell's case, Salk. 85.

nalty for an offence, to which a man is prompted by the natural love of liberty. (7)

There is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction, or not all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice, is construed a flight in law [t]. 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the
[388] fact and conviction [u]; for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz. c. 5.) will reach them; for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for a good consideration; so in case he happens to be convicted, the law will recover them for the king. (8)

[t] 3 Inst. 232. [u] 2 Hawk. P.C. c. 49. § 33.

(7) In modern practice it is not usual even to charge the jury to enquire as to the flight.

(8) See Vin. Abr. Forfeiture, P. 6., and Pauncefoot's case, cited 3 Rep. 82.

The

II. Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor [u].

This is one of those notions which our laws have adopted from the feodal constitutions, at the time of the Norman conquest; as appears from it's being unknown in those tenures which are indisputably Saxon, or gavelkind: wherein, though by treason, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore, as every other oppressive mark of feodal tenure is now happily worn away in these kingdoms, it is to be hoped, that this *corruption of blood*, with all its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for high treason, affecting the king's person or government. And [389] indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting, that, in certain treasons respecting the papal supremacy [w] and the public coin [x], and in many of the new-made felonies, created since the reign of Henry the eighth by act of parlia-

[u] See Vol. II. pag. 251.
[w] Stat. 5 Eliz. c. 1.
[x] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

The position, that the offender might recover back his goods, if acquitted, as not parted with for a good consideration, seems very questionable; for he has parted with them knowingly, voluntarily, and fraudulently; in such a case I should think the maxim *in pari delicto potior est conditio defendentis* would apply, and that the plaintiff could not successfully ask for the interference of a court of justice to help him out of the consequences of his own fraudulent act.

ment, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind) this saving was neglected, or forgotten, to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as by the afore-mentioned statute of 7 Ann. c. 21. (the operation of which is postponed by statute 17 Geo. II. c. 39.) after the death of the sons of the late pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony. (9)

(9) See p. 385. n. (5).

CHAPTER THE THIRTIETH.

OF REVERSAL OF JUDGMENT.

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A JUDGMENT may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter without writ of error. (1) As, where a commission issues to A and B, and

(1) That is, if such judgment comes collaterally in question, in any other cause, or court, the party against whom it is used, may so avoid it. But I do not see how it can be directly reversed, except by writ of error, either for error in fact, in which case it would lie before the same court, and the fact would be alleged; or for error in law. The case put of persons proceeding to judgment without a good commission, is one of those decided illegalities for which the law seems to afford no preventive remedy: they who do so, subject themselves, indeed, to punishments afterwards; but in the mean time they are acting in defiance of law, and are not, indeed, a court, to or from which any appeal can be formally made.

twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A or
[391] B: in this case all proceedings, trials, convictions, and judgments, are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error[a]; it being a high misdemesnor in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed and suffer death. So likewise if a man purchases land of another; and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat: now, upon any trial, the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself; and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before[b].

Secondly, a judgment may be reversed *by writ of error*: which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as, where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying an

[a] 2 Hawk. P. C. c. 50. § 2, 3. [b] 3 Inst. 231. 1 Hal. P. C. 361.

offence committed in the time of the late king, to be done against the peace of the present; and for many other similar causes, which (though allowed out of tenderness to life and [392] liberty) are not much to the credit or advancement of the national justice. These writs of error, to reverse judgments in case of misdemesnors, are not to be allowed of course, but on sufficient probable cause shewn to the attorney-general; and then they are understood to be grantable of common right, and *ex debito justitiae*. But writs of error to reverse attainders in capital cases are only allowed *ex gratia*; and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general[c]. These therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the state: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be some consolation to his family. But the easier, and more effectual way, is,

Lastly, to reverse the attainder by act of parliament. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some, or one of them, by act of parliament; which (so far as it extends) has all the effect of reversing the attainder without casting any reflections upon the justice of the preceding sentence.

The effect of falsifying, or reversing, an outlawry, is that the party shall be in the same plight as if he had appeared upon the *capias*; and, if it be before plea pleaded, he shall be put to plead to the indictment; if, after conviction, he shall receive the sentence of the law; for all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before. But when [393] judgment, pronounced upon conviction, is falsified or reversed,

[c] 1 Vern. 170. 175.

all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused: restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseisor[d]. But he still remains liable to another prosecution for the same offence: for, the first being erroneous, he never was in jeopardy thereby.

[d] 2 Hawk. P.C. c.50. § 20.

CHAPTER THE THIRTY-FIRST.

OF REPRIEVE AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A REPRIEVE, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time: whereby the execution is suspended. This may be, first, *ex arbitrio judicis*; either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right[a].

REPRIEVES may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, in *favorem prolis*; and therefore [395] no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty, that was exercised in the island of Guernsey, of burning a woman

[a] 2 Hal. P. C. 412.

big with child: and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the by-standers, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic[b]. A barbarity which they never learned from the laws of *antient* Rome; which direct[c], with the same humanity as our own, "*quod praegnantis mulieris damnatae poena dif-*"*feratur, quoad pariat:*" which doctrine has also prevailed in England, as early as the first memorials of our law will reach[d]. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict *quick with child*, (for barely, *with child*, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause[e]: For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

Another cause of regular reprieve is, if the offender becomes *non compos*, between the judgment and the award of execution[f]: for regularly, as was formerly[g] observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after convic-
[396] tion, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for, "*furiosus solo fu-*"*rore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him: and if he appears to be insane, the judge in his discretion may

[b] Fox, Acts and Mon.
[c] *Ff.* 48. 19. 3.
[d] Flet. *l.* 1. *c.* 38.
[e] 1 Hal. P. C. 369.
[f] *Ibid.* 370.
[g] See pag. 24.

and ought to reprieve him. (1) Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, *viz.* that he is not the same as was attainted, and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter* [h], and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted [i]: neither shall any peremptory challenges of the jury be allowed the prisoner [j]; though formerly such challenges were held to be allowable, whenever a man's life was in question [k].

II. If neither pregnancy, insanity, non-identity, nor other plea, will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon*; the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy; this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own [l]. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. His power of pardoning was said by our Saxon ancestors [m] [397] to be derived *a lege suæ dignitatis:* and it is declared in parliament, by stat. 27 Hen. VIII, c. 24. that no other person hath power to pardon or remit any treason or felonies what-

[h] 1 Sid. 72. See Append. § 3.
[i] Fost. 42.
[j] 1 Lev. 61. Fost. 42. 46.
[k] Staundf. P. C. 163. Co. Litt. 157. Hal. Sum. 259.
[l] Law. of Forfeit. 99.
[m] *LL. Edw. Conf.* c. 18.

(1) The law is more precisely stated at p. 25; supposing the party to have been sane at the commission of the crime, there can be no objection to indicting him, though he may become insane before the bill is preferred: because if he were in his senses, he could not be heard to allege any thing against the indictment before the grand jury. See the provisions on this subject now made by the 39 & 40 G. 3. c. 94. at p. 25. n. (2).

soever: but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm [n].

This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists [o]) should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter [p]; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to centre in one and the same person. This (as the president Montesquieu observes [q]) would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour. In
[398] Holland, therefore, if there be no stadtholder, there is no power of pardoning lodged in any other member of the state. But in monarchies the king acts in a superior sphere: and, though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of no-

[n] And this power belongs only to a king *de facto*, and not to a king *de jure* during the time of usurpation. (Bro. Abr. *t. charter de pardon*, 22.)

[o] Beccar. ch. 20.

[p] *Ibid.* ch. 4.

[q] Sp. L. b. 6. c. 5.

thing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.

UNDER this head of pardons, let us briefly consider, 1. The *object* of pardon: 2. The *manner* of pardoning: 3. The method of *allowing* a pardon: 4. The *effect* of such pardon, when allowed.

I. AND, first, the king may pardon all offences merely against the crown, or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the *habeas corpus* act, 31 Car. II. c. 2. made a *præmunire*, unpardonable even by the king. Nor, 2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders; "*non potest rex gratiam facere cum injuria et damno aliorum*[r]." Therefore, in appeals of all kinds, (which are the suit, not of the king, but of the party injured,) the prosecutor may release, but the king cannot pardon[s]. Neither can he pardon a common nusance, while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine: because though the prosecution is vested in the king to avoid multiplicity of suits, yet (during it's continuance) this offence savours more of the nature of a *private* injury to [399] each individual in the neighbourhood, than of a *public* wrong[t]. Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty.

THERE is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.* that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the earl of

[r] 3 Inst. 236.
[s] *Ibid.* 237.
[t] 2 Hawk. P. C. c. 37. § 33.
[u] 3 Inst. 238.

Danby was impeached by the house of commons of high treason, and other misdemesnors, and pleaded the king's pardon in bar of the same, the commons alleged [u], "that there "was no precedent that ever any pardon was granted to any "person impeached by the commons of high treason, or other "high crimes, *depending the impeachment*;" and thereupon resolved [w], "that the pardon so pleaded was illegal and void, "and ought not to be allowed *in bar* of the impeachment of "the commons of England;" for which resolution they assigned [x] this reason to the house of lords, "that the setting "up a pardon to be a *bar* of an impeachment defeats the "whole use and effect of impeachments; for should this "point be admitted, or stand doubted, it would totally dis-"courage the exhibiting any for the future; whereby the "chief institution for the preservation of the government "would be destroyed." Soon after the revolution, the commons renewed the same claim, and voted [y], "that a pardon "is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the act of settlement, 12 & 13 W. III. c. 2. "that no pardon under the great seal of England shall "be *pleadable* to an impeachment by the commons in parlia-"ment." But, after the impeachment has been solemnly heard and determined, it is not understood that the king's
[400] royal grace is farther restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

2. As to the *manner* of pardoning. 1. First, it must be under the *great* seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon [z]. 2. Next, it is a general rule, that, wherever it may reasonably be presumed the king is deceived, the pardon is void [a]. Therefore, any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the

[u] Com. Journ. 28 Apr. 1679.
[w] *Ibid.* 5 May 1679.
[x] *Ibid.* 26 May 1679.
[y] Com. Journ. 6 June 1689.
[z] 5 St. Tr. 166. 173.
[a] 2 Hawk. P.C. c. 37. § 46.

whole; for the king was misinformed [b]. 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony, (for it is presumed the king knew not of those proceedings,) but the conviction or attainder must be particularly mentioned [c]; and a pardon of felonies will not include piracy [d]; for that is no felony punishable at the common law. 4. It is also enacted by statute 13 Ric. II, st. 2. c. 1. that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which sir Edward Coke observes [e], that it was not the intention of the parliament, that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that which happens *se defendendo* or *per infortunium*: to which two [401] species the king's pardon was expressly confined by the statutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide shall be granted, but only where the king may do it *by the oath of his crown*: that is to say, where a man slayeth another in his own defence, or by misfortune. But the statute of Richard the second, before mentioned, enlarges by implication the royal power; provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obstante* of the statute of king Richard, till the time of the revolution; when the doctrine of *non obstantes* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the court of king's bench [f], that the king may pardon on an indictment of murder, as well as a subject may discharge an appeal. Under these and a few other restrictions, it is a general rule, that a pardon shall be

[b] 3 Inst. 238.
[c] 2 Hawk. P.C. c. 37. § 8.
[d] 1 Hawk. P. C. c. 37. § 6.
[e] 3 Inst. 236.
[f] Salk. 499.

taken most beneficially *for* the subject, and most strongly against the king.

A PARDON may also be *conditional*; that is, the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law [g]. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life, or for a term of years; such transportation or banishment [h] being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2. § 14., and both the imprisonment and transportation rendered more easy and effectual by statutes 8 Geo. III. c. 15. and 19 Geo. III. c. 74. (2)

3. WITH regard to the manner of *allowing* pardons: we may observe, that a pardon by act of parliament is more
[402] beneficial than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it [i]; neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon [k]. The king's charter of pardon must be specially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waved the benefit of such pardon [l]. But, if a man avails himself thereof, as soon as by course of law, he may; a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution. Antiently, by statute 10 Edw. III. c. 2. no pardon of felony could be allowed, unless the party found sureties for the good behaviour before the sheriff and coroners of the county [m]. (3) But that statute

[g] 2 Hawk. P. C. c. 37. § 45.
[h] Transportation is said (Bar. 445. 4th ed.) to have been first inflicted as a punishment, by statute 39 Eliz. c. 4.
[i] Fost. 43.
[k] 2 Hawk. P. C. c. 37. § 59.
[l] *Ibid.* c. 37. § 67.
[m] Salk. 499.

(2) See ante, p. 371. n. (4).
(3) And the party at the time of claiming the pardon, produced a writ out

is repealed by the statute 5 & 6 W. & M. c. 13., which, instead thereof, gives the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behaviour, with two sureties, for any term not exceeding seven years.

4. LASTLY, the *effect* of such pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father being made a new man, might transmit new inheritable blood; though, had he been born before the pardon, he could never have inherited at all [n]. (4)

[n] See Vol. II. pag. 254.

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out of chancery, commonly called a writ of allowance, testifying that he had complied with the statute, in finding sureties, &c. 2 Hawk. P. C. c. 37. s. 70.

(4) That is, if the son so born after the pardon, has no brother born before the pardon, who survives the father. For if he has, neither can inherit; not the elder, because the operation of the pardon is not retrospective; nor the younger, because he has an elder brother living, who at one time by possibility might have inherited, and that possibility will be sufficient to prevent the inheritance of the younger brother. 1 Co. Litt. 8. a.

CHAPTER THE THIRTY-SECOND.

OF EXECUTION.

THERE now remains nothing to speak of, but *execution*; the completion of human punishment. And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy: whose warrant for so doing was antiently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward, upon the execution of a peer[a]: though, in the court of the peers in parliament, it is done by writ from the king[b]. Afterwards it was established[c], that, in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name "let him be hanged by the neck:" formerly, in the days of Latin and abbreviation[d], "*sus. per col.*" for "*suspendatur per collum.*" And this is the only warrant that the sheriff has for so material an act as taking away the life of another[e]. It may certainly afford matter of speculation, that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name, and under the seal of
[404] the court, without which the sheriff cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note.

[a] 2 Hal. P.C. 409.
[b] See Append. § 5.
[c] Finch. L. 478.
[d] Staundf. P.C. 182.
[e] 5 Mod. 22.

THE sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London, indeed, a more solemn and becoming exactness is used, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure, that the law must take it's course, issues his warrant to the sheriffs: directing them to do execution on the day and place assigned[f]. And, in the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either specifying the time and place[g], or leaving it to the discretion of the sheriff[h]. And, throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted, that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed[i]. But, otherwise, the time and place of execution are by law no part of the judgment[k]. It has been well observed[l], that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

THE sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said[m]. It is held also by sir Edward Coke[n] and sir Matthew Hale[o], that even the [405] king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, sir Ed-

[f] See Append. § 4.
[g] St. Trials, VI. 337. Fost. 43.
[h] See Append. § 3.
[i] See page. 202.
[k] So held by the twelve judges, Mich. 10 Geo. III.
[l] Beccar. ch. 19.
[m] See pag. 179.
[n] 3 Inst. 52.
[o] 2 Hal. P. C. 412.

ward Coke stoutly maintains, that "*judicandum est legibus,* "*non exemplis.*" But others have thought[p], and more justly, that this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law. For, hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons, (*viz.* by remitting a severe kind of death, on condition that the criminal submits to a milder,) is a matter that may bear consideration. It is observable, that when lord Stafford was executed for the popish plot in the reign of king Charles the second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships, how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion (which is said to have been countenanced by lord Russell) that the king could not pardon any part of the sentence[q]. The lords resolved[r], that the scruples of the sheriffs were unnecessary, and declared, that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified[s] to the house of commons by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it; and then[t] sullenly resolved, that the house was *content* that the sheriff do execute lord Stafford, by severing his head from his body [only]. It is further related, that when afterwards the same lord Russel was condemned for high treason upon indictment, the king, while he remitted the ignominious part of the sentence, ob-
[406] served, "that his lordship would now find he was possessed "of that prerogative, which in the case of lord Stafford he "had denied him[u]." One can hardly determine (at this distance from those turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not

[p] Fost. 270. F.N.B.144. h. 19 Rym. *Foed.* 284.
[q] 2 Hum. Hist. of G.B. 328. 1st ed.
[r] Lords' Journ. 21 Dec. 1680.
[s] Com. Journ. 21 Dec. 1680.
[t] *Ibid.* 23 Dec. 1680.
[u] 2 Hume, 360. 1st ed.

thoroughly killed, but revives, the sheriff must hang him again [w]. For the former hanging was no execution of the sentence; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force [x], such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer [y].

And, having thus arrived at the *last* stage of criminal proceedings, or execution, the end and completion of human *punishment*, which was the sixth and last head to be considered under the division of *public wrongs*, the fourth and last object of the laws of England; it may now seem high time to put a period to these Commentaries, which, the author is very sensible, have already swelled to too great a length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring to recall to his memory some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions that have happened in the laws of England, from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

[w] 2 Hal. P.C. 412. 2 Hawk. P.C. c. 61. § 7.

[x] See page 332.

[y] Fitz. *Abr. t. corone.* 33. Finch. L. 467.

CHAPTER THE THIRTY-THIRD.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.

BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations, that have happened in the laws of England, I must first of all remind the student, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these Commentaries, under their respective divisions; these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose, is only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

THE several periods, under which I shall consider the state of our legal polity, are the following six: 1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of king Edward the first: 3. From thence to the reformation: 4. From the reformation to the restoration of king Charles the second: 5. From thence to the revolution in 1688: 6. From the revolution to the present time.

[408]

I. And, first, with regard to the antient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the antient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey,) to be instructed; we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII. is undoubtedly of British original. So likewise is the antient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, where the same custom has continued from Cæsar's time to the present; that of burning a woman guilty of the crime of petit treason by killing her husband. (1)

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution, the Romans, the Picts, and after them, the various [409] clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore we may suppose, mutually communicated to each other their respective usages[a], in

[a] Hal. Hist. C. L. 62.

(1) See ante, p. 204. n. (27).

regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out with any degree of accuracy, *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce, that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons; discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above-mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice[b]: so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies it's shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and it's government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of it's laws; unless we had as authentic monuments, thereof, as the Jews
[410] had by the hand of Moses[c]. Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means, whereby christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the mosaical, but also of the

[b] Hal. Hist. C.L. 57. [c] *Ibid.* 59.

imperial and pontifical laws, blended and adopted into our own system.

A FARTHER reason may also be given for the great variety, and of course the uncertain original, of our antient established customs; even after the Saxon government was firmly established in this island: *viz.* the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. (2) This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother-country, the great northern hive; which poured forth it's warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments; and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

WHEN therefore the West Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder (3), his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as masterly a manner: no less than to new-model the constitution; [411]

(2) The argument is equally strong, though the term heptarchy is improper; when the Saxon kingdoms were settled they were eight in number, Sussex, Kent, Wessex, East Anglia, Essex, Bernicia, Deira, and Mercia; and though Bernicia, and Deira were soon united, yet at the same time Essex, Kent, or Sussex ceased to be independent kingdoms. Turner's Hist. Anglo. Sax. vol. i. p. 309. ed. 3.

(3) Mr. Turner throws great discredit on the popular story that Egbert united all the rival states under his own sway, and entitled himself king of England; he observes that even to Alfred the monarchy of England cannot be justly attributed, because Danish sovereigns divided the island with him. Athelstan seems more properly the first king of England. Hist. Anglo Sax. 1. 441.

to rebuild it on a plan that should endure for ages; and, out of it's old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that master-piece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his dom-bec, or *liber judicialis*. This he compiled for the use of the court-baron, hundred, and county-court, the court-leet, and sheriff's tourn; tribunals, which he established, for the trial of all causes civil and criminal, in the very districts wherein the complaint arose: all of them subject however to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other. (4)

The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric: but a plan so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their antient law; retaining, however, some few of the customs of their late visitants; which went
[412] under the name of *Dane-Lage*: as the code compiled by Alfred was called the *West-Saxon-Lage*; and the local constitutions of the antient kingdom of Mercia, which obtained in

(4) See Vol. I. p. 64. n. (2). *Ibid.* 115. n. (12).

the counties nearest to Wales, and probably abounded with many British customs, were called the *Mercen-Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm; the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of it's first institution; though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

For king Edgar, (who, besides his military merit, as founder of the English navy, was also a most excellent civil governor,) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun what his grandson king Edward the confessor afterwards completed; *viz.* one uniform digest or body of laws to be observed throughout the whole kingdom; being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture (for certainty is not to be expected) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the *common* law, as extending it's authority universally over all the realm; and which is doubtless of Saxon parentage. (5)

Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation: the *wittena-gemote*, or *commune consilium* of the antient Germans, which was not yet reduced to the forms and distinctions of our modern parliament; without whose concurrence however, no new law could be made, or old one altered. [413]

(5) See Vol. I. p. 64. n. (2). Mr. Turner is disposed to detract much from the general reputation of Edgar; but he admits the excellence of his police, and his active administration of justice.

2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their port-reeves, (since changed into mayors and bailiffs,) and even their tything-men and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued; only that, perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence: even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in some measure succeeded. (6) 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feodal constitution; but yet were exempt from all it's rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feodal law: before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a

(6) Neither this mildness of the Anglo-Saxon laws, nor the principle of the *were*, seems to have extended to the case of theft; from the time of Athelstan, larceny to the value of twelve-pence was capital, and very severe punishments were inflicted still earlier for smaller offences. The *were* was the legal value of a man's life, which varied according to his rank; and if human life was thus made to vary in value, it is no wonder that personal estimation should vary in the same way; thus the oath of a twelf-hynd man was equal to the oaths of six ceorls. Besides the *were*, which was in some sort the legal protection of a man's life, there was a protection afforded to the security and peace of his house, called the *mund*; and this, like the *were*, varied in amount with the rank of the party. Turner, Anglo-Sax. Book vi. App. 3. ch. 3 & 5.

law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: though really inconvenient, and more especially destructive [414] to antient families; which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments; which were usually holden in different places, according as he kept the three great festivals of christmas, easter, and whitsuntide. An institution which was adopted by king Alonso VII. of Castile, about a century after the conquest: who at the same three great feasts was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home[d]. These county courts however differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman or sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very strong tincture of superstition, were permitted to be by *ordeal*, by the *corsned* or morsel of execration, or by *wager of law* with compurgators, if the party chose it; but frequently they were also by *jury*: for, whether or no their juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the

[d] Mod. Un. Hist. xx. 114.

Norman invasion; when the second period of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings: and though the alteration of the former was effected rather by the consent
[415] of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates. (7)

2. Another violent alteration of the English constitution consisted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them and all the antient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of

(7) See ante, p. 105. n. (1).

the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express licence from the king by a grant of a chase or free-warren: and those franchises were granted as much with a view to preserve the breed of animals as to indulge the subject. From a similar principle to which, though the forest-laws are now mitigated, and by degrees grown entirely obsolete, yet from this root [416] has sprung a bastard slip, known by the name of the game-law, now arrived to and wantoning in it's highest vigour: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons; but with this difference, that the forest-laws established only one mighty hunter throughout the land, the game-laws have raised a little Nimrod in every manor. And in one respect the antient law was much less unreasonable than the modern: for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but now, though a freeholder of less than 100*l.* a-year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free-warren) can do it without committing a trespass, and subjecting himself to an action. (8)

3. A THIRD alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be

(8) Whatever hardship there may be in this, if there be any, it is in no way connected with the game laws; but is simply the result of every man's exclusive right to his own property; a stranger has no more right to enter another's land to pick a flower, than to shoot a partridge.

carried on in the Norman, instead of the English language.(9) A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one
[417] mischief too deeply rooted thereby, and which this caution of king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the aera of refinement and subtilty. There is an active principle in the human soul, that will ever be exerting it's faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those who had leisure to cultivate it's progress, were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity; yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial: but which serves no other purpose, than

(9) Though the pleadings and arguments, being oral, were conducted in Norman French, yet the writs, records, and judgments were in Latin from the earliest traces which are to be found of them, — a mistake of the author's, which I have omitted to notice at Vol. III. p. 317.

to shew the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feodal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers have transmitted their dialect and finesses [418] to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to it's pristine simplicity and vigour; and the endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A FOURTH innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. BUT the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feodal tenure; which drew after it a numerous and oppressive train of servile

fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

The nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an ambi-
[419] tious, and a politic prince to create. The consciences of men were enslaved by sour ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived: who now imported from Rome for the first time the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustine the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws, too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battel. The forest-laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfeu*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard of forfeitures, tulliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights or *milites*, who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards, and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the

nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights, or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificancy happily retained, in their socage and burgage tenure, some points of their antient freedom. All the rest were villeins or bondmen. (10) [420]

From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors, to redeem themselves and their posterity into that state of liberty which we now enjoy: and which therefore is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavoured to maintain: but as, in general, a gradual restoration of that antient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force of the Norman. How that restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

William Rufus proceeded on his father's plan, and in some points extended it; particularly with regard to the forest-laws. But his brother and successor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring (as our monkish historians tell us) the laws of king Edward the confessor. The ground whereof is this; that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feodal tenures: but reserved the tenures

(10) Though the result of the Norman conquest may, in process of time, have been very nearly what is here described, yet it may be questioned whether the whole change is correctly attributed to William the First. It is clear that he made the laws of the Confessor the foundation of his own code: he enjoins obedience to them generally, with those additions which he had thought expedient; the general form and divisions of the municipal government remained unaltered; and when the state of servitude to which he reduced the country is dwelt upon, it should not be forgotten, that he facilitated, by formal provisions, the restoration to freedom of that part of the population, who were legal slaves. See his Laws in Wilkins, and Turner's History of England.

themselves, for the same military purposes that his father introduced them. He also abolished the *curfeu*[e]; for, though it is mentioned in our laws a full century afterwards[f], yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage) than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments (that of theft being made capital in his reign), and a few things relating to estates, particularly as to
[421] the descent of lands: which being by the Saxon laws equally to all the sons, by the feodal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris* "*feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots: reserving however these ensigns of patronage, *conge d'eslire*, custody of the temporalties when vacant, and homage upon their restitution. (11) He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time; from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest-laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

[e] Spelm. *Cod. LL. W. I.* 288. *Hen. I.* 299. [f] *Stat. Civ. Lond.* 13 Edw. I.

(11) See ante, p. 108. n. (3).

By the time of king Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvil; which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, carries a manifest superiority [s]. Throughout his reign also [422] was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign of Henry the second, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, *A. D.* 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere*; the king having divided the kingdom into six circuits (a little different from the present), and commissioned these now created judges to administer justice, and try writs of assise in the several counties. These remedies are said to have been then first invented; before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for

[s] Hal. Hist. C. L. 198.

little debts and minute actions, where even injustice is better than proscrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assise, or trial by a special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for per-
[423] sonal military service; which in process of time was the parent of the antient subsidies granted to the crown by parliament, and the land-tax of later times.

Richard the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest-laws with some rigour; which occasioned many discontents among his people: though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron, which are still extant, and of high authority; for in his time we began again to discover, that (as an island) we were naturally a maritime power. But with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croisade against the Saracens in the holy land.

In king John's time, and that of his son Henry the third, the rigours of the feodal tenures and the forest-laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, *magna carta*, and *carta de foresta*. Of these the latter was well calculated to redress many grievances, and encroachments of the crown, in the exertion of forest-law: and the former confirmed many liberties of the church, and redressed many grievances incident to feodal tenures, of no small moment at the time;

though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feodal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the crown, and from [424] the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbad the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assises to be taken in the proper counties, and establishing annual circuits: it also corrected some abuses then incident to the trials by wager of law and of battel; directing the regular awarding of inquest for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer: and regulated the time and place of holding the inferior tribunals of justice, the county-court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter;) it protected every individual of the nation in the free enjoyment of his life, his liberty, and

his property, unless declared to be forfeited by the judgment of his peers, or the law of the land. (11)

[425] However, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here, than he ever had before enjoyed; which continued through the long reign of his son Henry the third: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still farther improvement in the method and regularity of the common law, especially in the point of pleadings [h]. Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III.: and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The third commences with the reign of Edward the first, who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that sir Matthew Hale does not scruple to affirm [i], that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all

[h] Hal. Hist. C. L. 156. [i] *Ibid.* 158.

(11) I refer the reader to Mr. Hallam's excellent remarks on the general results of Magna Charta.

the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as they might not interfere with each other's proper business: to do [426] which they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors; confining them to causes of no great amount, according to their primitive institution; though of considerably greater, than by the alteration of the value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect, of fines levied in the court of common pleas: though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are antienter than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution, not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people: and upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulph, in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be

evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates-tail; concerning the good policy of which, modern times have, however, entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England (which was thoroughly completed in the reign of Henry the eighth); and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I MIGHT continue this catalogue much farther — but upon the whole we may observe, that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king [k]: and has continued nearly the same, in all succeeding ages, to this day, abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham, and the rest, are, for the most part, law at this day; or at least *were* so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *observation* of *magna carta*, rather than from it's *making* or *renewal*, in the days of his grandfather and father, that the liberty of Englishmen began again to rear it's head; though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his constitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance*: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of
[428] the peace, were taken from the people in the reigns of Ed-

ward II. and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have assumed it's present form; by a separation of the commons from the lords. (12) The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging cloth-workers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple: whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law, to distribute that personal property among the creditors and kindred of

(12) Mr. Hallam places this event earlier; in the 11th E. 1. the Commons sate at Acton Burnell, while the Lords were sitting at Shrewsbury: and a division of the houses may be traced with more or less clearness from the Parliamentary Rolls in the 8th, 9th, and 19th years of Ed. 2., and the 1 Ed. 3. Mr. Hallam indeed argues that it is highly improbable that the two houses ever intermingled in voting, because their respective money grants almost uniformly varied in amount, and because it cannot be conceived that the lords would have suffered the commons, who were numerically a large majority, to have interfered, and thereby acquired an overpowering influence, in their deliberations. When, however, the insignificance of the Commons, in the infancy of their assembling, is considered, the force of this latter argument is much weakened; their numerical majority would have been of little account in the eyes of the peers. It is probable, indeed, that in the beginning, the general business of the commons was to petition for alterations of the law, and to grant their money: in these two departments we may suppose that they were allowed to come to their own resolutions by themselves, and did not interfere with the lords in theirs; in measures of general government their office perhaps was rather to assent to the resolves of the king and lords than to deliberate as a distinct body. See Hallam. Midd. Ages, ch. viii. p 3.

the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *praemunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure for farther
[429] juridical improvement; "*nam silent leges inter arma.*" — And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of *common recoveries*; invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions. (13)

In the reign of king Henry the seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their

(13) In the reign of H. 6. many useful statutes passed relative to legal and judicial proceedings, the conduct of sheriffs and their officers, the qualification of jurors, and their punishment for corrupt verdicts. In this reign also the right of peeresses to a trial by peers was ascertained.

future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assises and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. The benefit of clergy (which so often intervened to stop attainders and save the inheritance) was now allowed only once to lay offenders who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what [430] either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, *viz.* the reformation of religion, under Henry the eighth, and his children; which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connections with this island cut off, the crown restored to it's supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time re-united to the civil, we should have seen the old Saxon constitution with regard to *ecclesiastical* polity completely restored.

With regard also to our *civil* polity, the statute of wills, and the statute of uses (both passed in the reign of this prince), made a great alteration as to property: the former, by allowing the *devise* of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having it's full beneficial effect. And thence the courts of

equity assumed a jurisdiction, dictated by common justice and common sense: which however arbitrarily exercised or productive of jealousies in it's infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity (which protected estates for years from being destroyed by the reversioner), a remarkable alteration took place in the mode of conveyancing: the antient assurance by feoffment and livery upon the land being now very seldom practised, since the more easy and more private invention of transferring property, by secret conveyances to uses, and long terms of years being now continually created in mortgages
[431] and family settlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

The farther attacks in this reign upon the immunity of estates-tail, which reduced them to little more than the conditional fees at the common law, before the passing of the statute *de donis*; the establishment of recognizances in the nature of a statute-staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to re-assume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy; and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII. a very distinguished æra in the annals of juridical history.

It must be however remarked, that (particularly in his latter years) the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the worst circumstance, it's encroachments were established by law,

under the sanction of those pusillanimous parliaments, one of which, to it's eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treasons, which were slightly touched upon in a former chapter[1]. Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary, many salutary and popular laws, in civil matters, were made under [432] her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well-concerted schemes for effecting which, were (through the providence of God) defeated by the seasonable accession of queen Elizabeth.

The religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis; (though obliged in their infancy to be guarded, against papists and other non-conformists, by laws of too sanguinary a nature,) the forest-laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church; that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienations

[1] See pag. 86.

of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and clothing of millions; by affording them the means (with proper industry) to feed and to clothe themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

[433] However, considering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home: yet, the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals; but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to shew, that these were not those golden days of genuine liberty that we formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power of the sovereign.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means, which afterwards reduced it's power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property

and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feodal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had [434] strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay, even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler, which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies; the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves), and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their antient

patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the com-
[435] mons were not yet sensible of the strength they had acquired, nor urged to examine it's extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. (14) The latter years of Henry the eighth were therefore the times of the greatest despotism that have been known in this island since the death of William the Norman; the prerogative as it then stood by common law (and much more when extended by act of parliament), being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted it's channel, and wisdom enough not to provoke the commons to discover and feel

(14) There are not wanting instances, however, at the close of the reign of E. 3., all through that of Rich. 2., and even in that of H. 5. of the exercise of great power and influence by the commons; but in general these were instances of their acting in union with a party in the House of Lords, to the restraint of the prerogative; and in the instances of Ed. 3. and Rich. 2. advantage was evidently taken of a temporary weakness, or great unpopularity in the crown. In the case of H. 5. there seems to be clear proof of a substantive weight and influence in the commons, when they procured a promise that a stop should be put to the practice of framing statutes upon their petitions, with such additions and omissions as made the former very different from that which the latter had prayed for.

their strength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much œconomy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely for the space of half a century together, reign in the affections of the people.

[436] On the accession of king James I., no new degree of royal power was added to, or exercised by him; but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it: and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between lord Ellesmere

and sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice. (15)

Indeed when Charles the first succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of
[437] that misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest-laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commission courts was also extremely great; though their usurped authority was still greater. And if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds mos amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given: for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feodal tenures; though it must be acknowledged that

(15) To the author's short list of improvements in the law in the reign of J. 1. may be added the statutes for extending the benefit of clergy to women in certain offences, the restriction upon costs in certain frivolous actions, and the salutary assistance afforded to magistrates in their defence to actions brought against them for things done in the execution of their office.

these concessions were not made with so good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity, which is the greatest unhappiness that can befal a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed therefore with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his [438] power, the popular leaders (who in all ages have called themselves the *people*) began to grow insolent and ungovernable: their insolence soon rendered them desperate: and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I PASS by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of feodal tenures, the act of navigation, and some others) were adopted in the (16)

(16) Perhaps the author dismisses with too little ceremony the labours of the parliament collected in Scobell's Statute Book. I will mention two very important ordinances; that of 1654, c. 36. against duelling, and that of the same year, c. 44. for regulating the high court of Chancery. The first, besides some regulations which go to prevent the giving or accepting of challenges, makes all deaths which happen in duels murder; and the offence, both of principals and seconds when death does not ensue, punishable with banishment for life. The latter contains long and elaborate rules for the jurisdiction and proceedings of the court of chancery, from which, perhaps, some useful matter might be derived, even in the present day.

V. Fifth period, which I am next to mention, *viz.* after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, and with it our antient constitution, deserves no commendation from posterity, yet in his reign (wicked, sanguinary, and turbulent as it was), the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time since it's total abolition at the conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property and persons, form a second *magna carta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feodal system; but the statute of Charles the second extir-
[439] pated all it's slaveries; except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice. *Magna carta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties; the abolition of the writ *de haeretico comburendo*; the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates, and that of amendments and *jeofails*, which cut off those superfluous

niceties which so long had disgraced our courts; together with many other wholesome acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that "the constitution of England had arrived to it's full vigour, "and the true balance between liberty and prerogative was "happily established by *law*, in the reign of king Charles "the second."

It is far from my intention to palliate or defend many very iniquitious proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestible is this; that *by the law*[m], as it then stood (notwithstanding some invidious, nay dangerous, branches of the prerogative have since been lopped off, and the rest more clearly defined), the people had as large [440] a portion of real liberty as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together. Which introduces us to the last period of our legal history; *viz.*

VI. From the revolution in 1688 to the present time. In this period many laws have passed; as the bill of rights, the toleration-act, the act of settlement with it's conditions, the act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed, and exemplified, the doctrine of

[m] The point of time at which I would chuse to fix this *theoretical* perfection of our public law, is in the year 1679; after the *habeas corpus* act was passed, and that for licensing the press had expired; though the years which immediately followed it were times of great *practical* oppression.

resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal: have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow-peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appear-
[441] ance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the antient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the riot-act, and the annual expedience of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence as it has apparently lost in prerogative.

The chief alterations of moment (for the time would fail me to descend to *minutiæ*) in the administration of private justice during this period, are the solemn recognition of the law of nations with respect to the rights of embassadors: the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulations of trials by jury, and the admitting witnesses for prisoners upon

oath: the farther restraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine fort et dure*: the extension of the benefit of clergy, by abolishing the pedantic criterion of reading: the counterbalance to this mercy, by the vast increase of capital punishment; the new and effectual methods for the speedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and establishment of paper-credit, by indorsements upon bills and notes, which have shewn the legal possibility and convenience (which our ancestors so long doubted) of assigning a *chose in action*: the translation of all legal proceedings into the English language: the erection of courts of conscience for recovering small debts, and (which is much the better plan) the reformation of county courts: the great system of marine jurisprudence, of which the foundations have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases: and, lastly, the liberality of sentiment, which (though late) has now taken possession of our courts of common law, and induced them to adopt (where facts can be clearly ascertained) the same principles of redress as have prevailed in our courts of equity, from the time that lord Nottingham presided there; and this, not only where specially impowered by particular statutes (as in the case of bonds, mortgages, and set-offs), but by extending the remedial influence of the equitable writ of trespass on the case according to it's primitive institution by king Edward the first, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations that have happened with respect to private justice in the course of the present century. [442]

Thus therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time. We have seen, in the course of our enquiries, in this and the former

volumes, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages; that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, since: that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the restoration of king Charles, nor fully
[443] and explicitly acknowledged and defined, till the aera of the happy revolution. Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely it's due: — the thorough and attentive contemplation of it will furnish it's best panegyric. It hath been the endeavour of these commentaries, however the execution may have succeeded, to examine it's solid foundations, to mark out it's extensive plan, to explain the use and distribution of it's parts, and from the harmonious concurrence of those several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of antient simplicity, and the more curious refinements of modern art. Nor have it's faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure; defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind. (17)

(17) I wish it were in my power to finish this sketch of our legal history in the same faithful and spirited manner in which the author has begun and carried it down to his own time. Since the year 1780, in which he died,

died, the legislature has provided ample materials for one who saw things in so liberal and comprehensive a spirit, and arranged them in such striking and lucid order. In regard to legal and judicial matters he might have pointed out the restraint imposed on the arrest of the person, and the right given to a discharge on making a deposit with the arresting officer; the assistance afforded to inferior courts by arming them with the process of the superior where necessary; the prevention of delay in the trial of misdemeanors, and the salutary increase of severity in their punishment; the great general diminution of the number of capital offences, and the necessary and wise addition made to the severity of substituted and inferior punishments; the making capital certain aggravated attempts at murder, and the simplifying the trial of certain enormous treasons; the abolition of many punishments, as that of the pillory and the burning, or whipping of females; and of the barbarous and shocking parts of others, as that of embowelling in treason; the suppression of appeals in treason, murder, or felony, and of the trial by battel in civil suits; the taking away corruption of blood, except in cases of treason or murder; the provision for the expenses of prosecutions in felony, and for the care and disposal of lunatic offenders; the great improvements in the system of gaols and houses of correction; the declaration of the functions of the jury in the case of libel; the regulation of the ecclesiastical courts; the trial and punishment of offences committed on the high seas, or in the colonies; and last, not least, the revision and consolidation of the laws, which regulate that great bulwark of our liberties, the trial by jury.

As measures calculated to secure the integrity of the representative body, Sir W. Blackstone would probably have noticed the act for securing the independence of the Speaker, those which prevent public contractors, and certain public officers from sitting in the house, which suspend, or remove bankrupt members from their seats; and prohibit persons filling offices in the revenue from voting at elections.

In matters of general or internal polity, he would have pointed out the formation of a regular system and jurisdiction for the punishment, as well as relief of insolvent debtors; the many amendments, and finally the consolidation of the bankrupt law; the great diminution of the disabilities of roman catholics and dissenters; the liberal alterations in the spirit of the navigation laws; the attempts to estimate accurately the increase of population by a census taken at stated intervals, and a more careful keeping of parochial registers; the sensible and humane attempts to modify and improve the poor laws; the protection and encouragement afforded to friendly societies, and the institution of banks for the savings of the poor; the grand measure of the Union with Ireland; the honest renunciation of the slave trade for ourselves, and the sincere and repeated endeavours to procure its abolition by all other nations.

These might form some of the features of the picture with which the Commentaries might have closed, if they had been written in the present day; the system is still imperfect, and many things remain to be done, which the author might, perhaps, have suggested with something of judicial authority. Without thinking myself entitled to do so, I may venture to express not only my wishes, for the gradual perfecting of the English laws

and constitution, but my strong conviction, that they will continue to be improved with the increasing lights of the age. It is our great blessing to have the machinery of improvement always ready to work, in a legislature which, though almost permanently sitting, is yet drawn from the general body of the people, forms part of it, mixes in all its businesses and amusements, and is acted upon by all its hopes, fears, and interests. The very facility of legislation perhaps leads to inconvenience in the multiplying of laws, and in provoking attempts to remedy inconveniences which must be borne, or prevent evils which the unassisted prudence of individuals might more wisely be left to guard against. But these are comparatively slight evils, not counterbalancing the great good of possessing a power of improvement perpetually advancing with the age. It becomes not the Commentator on the laws to indulge in a spirit of indiscriminate approbation; perhaps it was the leaning of Sir W. Blackstone's mind to take too favourable a view of his subject, a more excusable failing than the opposite one of a captious and querulous spirit; but I think he might have reasonably indulged the conviction which I have expressed above, because the characteristic of the legislature for the last fifty years has been a sincere desire of general improvement; and a particular zeal for the bettering the condition of the lower, or unfortunate classes of society. Fewer measures, purely aristocratic, have passed into laws than heretofore; while no proposition has been coldly received, that was sensible in its details, and had for its object the reformation of the criminal, the instruction of the ignorant, the dissemination of sound religion, the vindicating the rights of the oppressed, or the gradual advancement of the labouring and mechanic orders of the population.

With these remarks, and not willing unnecessarily to expose myself to disadvantageous comparisons by repeating in less forcible language the sentiments with which Blackstone closes his work, but with which I entirely concur; I terminate what has been for a long time the interesting employment of my leisure hours. No one can be so sensible of the imperfection of my attempt, as I am myself; but few, perhaps, appreciate so sensibly the difficulties of the task. I confess freely, that when I commenced it, I had not duly measured my own ability to encounter them; if I had, I should never have ventured upon the undertaking. But the work is now before the public; I can truly say that a sense of my own weakness has never been wanting to me in the whole course of it, and I believe that I have laid down nothing presumptuously, nor written any thing in a spirit of party. Imperfect as it is, I am compelled to commit it to the public judgment, and if, in the opinion of a liberal profession, I shall be thought to have contributed any thing towards making the Commentaries more generally useful, I shall feel that I have laboured to a good purpose, and am most satisfactorily rewarded.

THE END OF THE FOURTH BOOK.

APPENDIX.

§ 1. Record *of an Indictment and Conviction of* Murder, *at the Assises.*

Warwickshire, to wit. } Be it remembered, that at the general session of the lord the king of *oyer* and *terminer*, holden at Warwick in and for the said county of Warwick, on Friday the twelfth day of March, in the second year of the reign of the lord George the third, now king of Great Britain, before Sir Michael Foster, knight, one of the justices of the said lord the king assigned to hold pleas before the king himself, Sir Edward Clive, knight, one of the justices of the said lord the king, of his court of common bench, and others their fellows, justices of the said lord the king, assigned by letters patent of the said lord the king, under his great seal of Great Britain, made to them the aforesaid justices and others and any two or more of them, (whereof one of them the said Sir Michael Foster and Sir Edward Clive, the said lord the king would have to be one,) to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the monies of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties,

Session of *oyer* and *terminer*.

Commission of

deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessories of the same, within the county aforesaid, as well within liberties as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters patent of the said lord the king specified, the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said lord the king, assigned to hear and determine divers felonies, trespasses and other misdemesnors committed within the county aforesaid by the oath of Sir James Thompson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Lawrence Hall, and Charles Carter, Esquires, good and lawful men of the county aforesaid, then and there impannelled, sworn, and charged to inquire for the said lord the king and for the body of the said county, it is presented, that Peter Hunt, late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of March in the said second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Peter Hunt with a certain drawn sword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him the said Samuel Collins then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the said Samuel Collins, then and there, with the sword drawn as aforesaid, in and upon the left side of the belly of him the said Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid in the said county of Warwick, from the said fifth day of March in the year aforesaid until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March in the year aforesaid, the said Samuel Collins at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did

oyer and *terminer*. and of the peace.

Grand Jury.

Indictment.

die; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown and dignity. Whereupon the sheriff of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick and him safely keep to answer to the felony and murder whereof he stands indicted. Which said indictment the said justices of the lord the king above-named, afterwards, to wit, at the delivery of the gaol of the said lord the king, holden at Warwick in and for the county aforesaid, on Friday the sixth day of August in the said second year of the reign of the said lord the king, before the right honourable William lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, Sir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said gaol of the county aforesaid of the prisoners therein being, by their proper hands to deliver here in court of record in form of the law to be determined. And afterwards, to wit, at the same delivery at the gaol of the said lord the king, of his county aforesaid, on the said Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king last above-named and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid, (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed,) being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed: And forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith that he is not guilty thereof; and thereof for good and evil he puts himself upon the country; And John Blencowe, esquire, clerk of the assizes for the county aforesaid, who prosecutes for the said lord the king in this behalf, doth the like: Therefore let a jury thereupon here immediately come before the said justices of the lord the king last above-mentioned, and others their fellows aforesaid, of free and lawful men of the neighbourhood of the said parish of Lighthorne in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognize upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the

Capias.

Session of gaol delivery.

Arraignment.

Plea; not guilty. Issue.

Venire.

indictment aforesaid above specified, or not guilty; because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose impannelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who being elected, tried, and sworn, to speak the truth of and concerning the premises, upon their oath say, that the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt at the time of committing the said felony and murder, or at any time since to this time, had not nor hath any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere, to the knowledge of the said jurors. And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who nothing farther saith, unless as he before had said. Whereupon, all and singular the premises being seen, and by the said justices here fully understood, it is considered by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the said county of Warwick, from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be dissected and anatomized.

Verdict; guilty of *murder.*

Judgment of death,

and dissection.

§ 2. *Conviction* of Manslaughter.

——— upon their oath say, that the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor hath any goods or chattels, lands, or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time to the knowledge of the said jurors. And immediately it is demanded of the said Peter Hunt, if he hath or knoweth any thing to say wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who saith that he is a clerk, and prayeth the benefit of clergy to be allowed him in

Verdict; — not guilty of *murder*; guilty of *manslaughter.*

Clergy prayed. Judgment

this behalf. Whereupon, all and singular the premises being seen, and by the said justices here fully understood, it is considered by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute.

to be burned in the hand, and delivered.

§ 3. *Entry of a Trial* instanter *in the Court of King's Bench, upon a collateral Issue; and Rule of Court for Execution thereon.*

Michaelmas term, in the sixth year of the reign of king George the third.

Kent; the King against Thomas Rogers, } The prisoner at the bar being brought into this court in custody of the sheriff of the county of Sussex by virtue of his majesty's writ of *habeas corpus*, it is ordered, that the said writ and the return thereto be filed, And it appearing by a certain record of attainder, which hath been removed into this court by his majesty's writ of *certiorari*, that the prisoner at the bar stands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the said prisoner at the bar having heard the record of the said attainder now read to him, is now asked by the court here, what he hath to say for himself, why the Court here should not proceed to award execution against him upon the said attainder? He for plea saith, that he is not the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced: and this he is ready to verify and prove, *&c.* To which said plea the honourable Charles Yorke, esquire, attorney-general of our present sovereign lord the king, who for our said lord the king in this behalf prosecuteth, being now present here in court, and having heard what the said prisoner at the bar hath now alleged, for our said lord the king by way of reply saith, that the said prisoner now here at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the country; and the said prisoner at the bar doth the like; Therefore let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the said prisoner, to try upon their oath, whether the said prisoner at the bar be the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as afore-

Habeas corpus. Record of attainder read; for felony and robbery. Prisoner asked what he can say in bar of execution. Plea; not the same person. Replication, averring that he is. Issue joined. *Venire* awarded *instanter.*

said or not; because as well the said Charles Yorke, esquire, attorney-general of our said lord the king, who for our said lord the king in this behalf prosecutes, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. And immediately thereupon the said jury come here into court; and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, and having heard the said record read to them, do say upon their oath, that the said prisoner at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, in manner and form as the said attorney-general hath by his said replication to the said plea of the said prisoner now here at the bar alleged. And thereupon the said attorney-general on behalf of our said lord the king now prayeth, that the Court here would proceed to award execution against him the said Thomas Rogers upon the said attainder. Whereupon all and singular the premises being now seen and fully understood by the court here, it is ordered by the court here that execution be done upon the said prisoner at the bar for the said felony in pursuance of the said judgment, according to due form of law: And it is lastly ordered, that he the said Thomas Rogers, the prisoner at the bar, be now committed to the custody of the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the said defendant, the prisoner at the bar for the said felony, in pursuance of the said judgment, according to due form of law.

Jury sworn.

Verdict; that he is the same.

Award of execution.

On the motion of Mr. Attorney-General.

By the Court.

§ 4. *Warrant of Execution on Judgment of Death, at the general Gaol-delivery in* London *and* Middlesex.

London and Middlesex. } To the sheriffs of the city of London; and to the sheriff of the county of Middlesex; and to the keeper of his majesty's gaol of Newgate.

Whereas at the session of gaol-delivery of Newgate for the city of London and county of Middlesex, holden at Justice Hall in the Old Bailey, on the nineteenth day of October last, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received sentence of death for the respective offences in their several indictments mentioned: Now it is hereby ordered, that execution

of the said sentence be made and done upon them the said Patrick Mahony and Roger Jones, on Wednesday the ninth day of this instant month of November at the usual place of execution. And it is his majesty's command, that execution of the said sentence upon them the said Charles King and Mary Smith be respited, until his majesty's pleasure touching them be farther known.

Given under my hand and seal this fourth day of November, one thousand seven hundred and sixty-eight.

James Eyre, Recorder. LS..

§ 5. *Writ of Execution upon a Judgment of* Murder, *before the* King *in* Parliament.

GEORGE the second, by the grace of God of Great Britain, France and Ireland, king, defender of the faith, and so forth, to the sheriffs of London and sheriff of Middlesex, greeting. Whereas Lawrence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present parliament; and the said Lawrence earl Ferrers, viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence earl Ferrers, viscount Tamworth, hath before us in our said parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our said parliament, that the said Lawrence earl Ferrers, viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by these presents strictly command you that upon Monday the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence earl Ferrers, viscount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London, or to his deputy directed, we have commanded) into your custody you then and there receive: and him in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn: and that you do cause execution to be done upon the said Lawrence earl Ferrers, viscount Tamworth, in your custody

so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. Witness ourself at Westminster the second day of May, in the thirty-third year of our reign.

Yorke and Yorke.

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